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THE LAW

OF

SUBROGATION.

BY

HENRY N. SHELDON.

SECOND EDITION.

BOSTON:
THE BOSTON BOOK COMPANY.
1893.

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312406

University Press:
JOHN WILSON AND SON, CAMBRIDGE.

PREFACE TO SECOND EDITION.

In preparing this new edition, I have carefully examined the later decisions, and have also gone over the whole subject anew, and have made such additions and such changes and emendations as seemed to be called for. The number of cases cited has been considerably more than doubled, and the text has been much enlarged. Many sections have been practically rewritten; and many of my former statements have been much condensed. I have tried to state the law as briefly and as correctly as was within my power. The unexpected favor with which this little work has been received has made me the more anxious to spare no pains in its improvement.

H. N. S.

Boston, January 31, 1893.

PREFACE TO FIRST EDITION.

IT has been my endeavor, in the composition of this book, to state the doctrines which have been laid down by the courts in applying the law of subrogation, without going, beyond the most limited extent, outside of the adjudications of this country and of England. Regarding it as the distinguishing feature of our system of law that it is established by judicial decisions *a posteriori*, and not deduced from *a priori* reasonings, I have made no attempt to go further than the courts have gone; but I have desired to state, as correctly as might be, and with sufficient fulness to be intelligible, the general principles which have been declared by the courts, and the important applications which have been made of these principles.

The most logical division which could be made of this subject would be, as it seems to me, to divide it into two heads: first, the subrogation of junior creditors of a common debtor, or of parties holding subordinate interests in the same property, to the rights and remedies of senior creditors, or of persons holding paramount claims upon the property, after such junior parties have for the protection of their own interests satisfied the superior claims; secondly, the subrogation of one of several debtors who has, either under compulsion or for the protection of his property, satisfied a common creditor or a creditor holding a charge upon his property as well as upon that of others, against those debtors by whom, or the owners of that property from which, he ought to have been indemnified, in whole or in part, against the burden which he has thus discharged. The first of these classes would include the subject-matter of my second chapter, on the subrogation of persons holding successive claims upon the same property, most of the cases of the subrogation of devisees and legatees, and probably the subrogation of insurers. Under the second head would be included the subrogation of sureties, of co-sureties, of joint debtors, of parties to bills and notes, and most cases which arise in the administration of trusts. But it has on the whole seemed best to me, for practical convenience, after defining the subject and after a general chapter upon the subrogation of different parties having successive claims upon the same property by mortgage, lien, or purchase, to consider separately subrogation in cases of suretyship, among joint debtors, among parties to bills and notes, in the administration of estates, under contracts of insurance, and in favor of strangers. Also for purposes of practical convenience, and because the subjects have often been discussed together by the courts, I have treated under these different heads the substitution of a creditor to the remedies and securities which are held by the surety of his debtor, or by his debtor against one who, by agreement with the debtor, has assumed the burden of the debt, although I am aware that this is not strictly part of the law of subrogation, being rather the converse of that doctrine.

My subject being a small one, I have endeavored to make a copious citation of authorities, even at the risk of seeming needlessly to multiply references for the support sometimes of undisputed propositions.

H. N. S.

BOSTON, April 11, 1882.

ANALYSIS OF CONTENTS.

CHAPTER I.

PAGE
DEFINITION AND GENERAL NATURE 1

§ 1. Definition of Subrogation 1
2. Definition in the Civil Law 3
3. Who will be subrogated 4
4. It is a Mode of Equitable Relief 5
5. Doctrine adopted in Louisiana 6
6. Follows the Discharge of an Obligation. Adds Nothing to the Right 7
7. Instances. Subrogation of a Sheriff 8
8. Subrogation of one who has advanced Money for the Payment of an Incumbrance 10
9. Of one who has been compelled to pay the Debt of another . 12
10. Of a Carrier 13
10 *a*. Of a Consignee or Agent 14
11. General Doctrine of Subrogation 15

CHAPTER II.

SUBROGATION IN CASES WHERE DIFFERENT PARTIES HAVE SUCCESSIVE CLAIMS UPON THE SAME PROPERTY, BY MORTGAGE, LIEN, OR PURCHASE 17

§ 12. Subrogation of a Junior Incumbrancer upon Payment of a Prior Incumbrance 19
13. Subrogation will be made to serve the Purposes of Justice and the Intent of the Parties 21
14. Subrogation upon Redemption from a Prior Incumbrance . 22
15. Subrogation of Junior Incumbrancer compelled to pay a Prior Charge 24
16. Duty of Prior to Junior Incumbrancer 25
17. Junior Incumbrancer's Right of Redemption 26
18. When Junior Incumbrancer entitled to Subrogation . . . 27

PAGE
§ 19. Subrogation of one advancing Money for the Payment of an Incumbrance 28
20. Where new Incumbrance given for old 32
21. Holder under a Judgment Lien subrogated upon paying Prior Incumbrance 36
22. Where Incumbered Lands sold under a Junior Lien . . . 37
23. Subrogation of an Assignee in Bankruptcy 39
24. Subrogation of a Mortgagor against a Purchaser of the Equity who has assumed the Mortgage 40
25. Rights of Mortgagor against Mortgagee and such a Purchaser 42
26. Subrogation of the Mortgagor against his Grantee subject to the Mortgage 44
27. Rights of Co-mortgagees against each other 46
28. Subrogation of the Purchaser of an Equity of Redemption on his Payment of a Prior Incumbrance 46
29. Rights of such a Purchaser 48
30. Purchaser, if his Purchase avoided, subrogated to Lien which he has paid 49
31. Purchaser under a Mortgage or Charge subrogated to its Lien 50
32. Rights of such a Purchaser in California 52
33. Instances of such Subrogation 53
34. Purchaser ordinarily subrogated to all the Rights of his Vendor 54
35. Where the Purchaser pays Debts with which the Property was chargeable 56
36. Purchaser compelled to pay his Vendor's Debt subrogated to Creditor's Rights against his Vendor 57
36 *a*. Purchaser's Subrogation does not depend upon the Validity of his Title 58
37. Limitation of Purchaser's Right of Subrogation 60
38. Subrogation of the Purchaser at an Execution-sale against the Debtor 61
39. Subrogation of such Purchaser where the Property recovered by third Parties 63
40. Rights of a Purchaser whose Purchase is voidable by the Creditors of his Vendor 64
41. Waiver of the Right of Subrogation 65
42. What is not a Waiver 66
43. Right lost by Negligence resulting in Prejudice to others . . 67
44. The Party seeking Subrogation must not be in his own Wrong 68
45. When one entitled to be subrogated to a Lien may demand an Assignment thereof 69
46. The Real Debtor cannot be subrogated 71
47. Assignment to one who is bound to pay the Debt tantamount to a Discharge 73

PAGE
§ 48. Subrogation of a Dowress who has paid a Paramount Lien on the Property 75
49. Widow's Right of Dower against a Purchaser who has paid an Incumbrance to which her Dower was subject 75
50. Dower let in if Debt paid by one bound to pay it 78
51. The Widow may redeem. Her Rights thereupon 79
52. The Rule in Massachusetts 80
53. Assignment of a Mortgage to the Owner of the Equity of Redemption will not necessarily extinguish its Lien . . 81
54. Tests by which Merger is determined 83
55. Incumbrance so assigned, kept alive only for a Good Purpose and to protect a Beneficial Interest 83
56. Mortgage assigned to the Principal Debtor is extinguished . 84
57. Conveyance of the Equity to the Holder of a Prior Incumbrance will not extinguish it in Favor of a Junior . . . 85
58. Conveyance of Equity in Payment of Prior, will not advance Junior, Incumbrance 87
59. When a Conveyance of the Equity to the Mortgagee will be regarded as a Payment of the Mortgage-debt 88
60. An intervening Estate will prevent a Merger 90
61. The Doctrine of Two Funds 91
62. A Creditor whose Fund has been taken to pay a Prior Debt subrogated to the Lien of that Debt on other Funds . . 92
63. Doctrine of Two Funds not applied, if it would work Injustice to Senior Creditor 93
64. Where one of the Two Funds is itself subject to Prior Incumbrances 96
65. Doctrine of Two Funds not applied where it would be injurious to Third Parties 97
66. Where one of the Funds is primarily liable for the Payment of both Debts 98
66 *a*. Waiver of Right of Marshalling Assets 99
67. Junior Creditor cannot claim the Benefit of a Lien established subsequently to his own 100
68. Creditor subrogated only to a Fund which ought to have discharged the Debt his Fund has paid 100
68 *a*. Where each Creditor has a Lien upon the Same One of the Funds 101
69. Doctrine of Two Funds applied only if Debtors are the same 102
70. Junior Creditor cannot be subrogated until Prior Creditor satisfied 103
71. Application of these Principles to a Case of Several Creditors of Joint and Several Debtors 104
72. Release by Prior Creditor of Fund primarily liable to him . 104
73. But Release of Primary Fund will not prejudice Prior Creditor if made in Good Faith and without Notice 106
74. Purchase of a Portion of an Incumbered Estate; Rights of the Purchaser 106

PAGE
§ 75. Order of Liability of Separate Parcels of Incumbered Estate sold successively 108
76. Rule in Iowa and Kentucky 110
77. No Distinction between Mortgage and Judgment-lien or other Incumbrance 111
78. Release of Estate primarily liable discharges *pro tanto* that secondarily liable 113
79. Release of Estate primarily liable will not exonerate Estate secondarily liable, unless in Justice it ought to have that Effect 115
80. Release of any Remedy to which the Subsequent Grantee would be subrogated releases the Lien on the latter's Property . 117
81. Prior Incumbrancer not affected by Subsequent Alienations of the Premises unless notified of them 118
82. The Mortgagor may by Stipulation vary the Order of Liability 119
83. Extent of the Right of a Subsequent Purchaser 121
84. Instances of the Application of these Rules 123
85. When the Purchaser of an Equity of Redemption assumes the Payment of the Mortgage 126

CHAPTER III.

SUBROGATION IN CASES OF SURETYSHIP 131

§ 86. Surety's Right of Subrogation 133
87. It is an Equitable Assignment to the Surety 136
88. Surety subrogated to Priority of Creditor 138
89. Sureties of a Trustee subrogated to the Rights of the Trustee and of the *Cestuis que Trustent* 139
90. Sureties of a Sheriff subrogated to Rights which they have satisfied for him 140
91. Subrogation of a Debtor's Surety against a Sheriff . . . 141
92. Surety subrogated to Corporation's Lien upon the Stock of its Shareholders 142
93. Surety entitled to be subrogated, though not in Privity with his Principal 143
94. Surety upon a Bond entitled to the Benefit of a Prior Bond for the same Debt 144
95. Surety subrogated to the Benefit of an Agreement made by his Creditor 144
96. Surety of a Purchaser subrogated to Vendor's Right of Rescission 144
97. Surety of a Purchaser subrogated to a Title or Lien retained by the Vendor 145
98. Surety for Vendor subrogated to Equitable Rights of Vendee 146
99. Right of Vendor who becomes Surety for Vendee 147
100. Surety entitled to Funds held for the Debt in the hands of his Principal 148

PAGE
§ 101. Surety may avail himself of his Principal's Right of Set-off or Defence 149
102. The Surety is a Creditor of the Principal 152
103. Surety does not lose this Right by agreeing to exonerate his Co-sureties 153
104. One who has pledged his Property for the Debt of another entitled to Subrogation 153
105. Extent to which Subrogation will be carried 155
106. Surety of Surety may be subrogated; how far 156
107. How far Creditors of the Surety may be subrogated . . . 157
108. Creditor cannot discharge Security for his own Benefit after Payment by Surety 158
109. Instances of the Application of the Doctrine of Subrogation for the Protection of Sureties 158
110. Surety's Right of Subrogation may be lost by his Waiver . 160
111. Surety's Right of Subrogation subject to Creditor's Rights . 163
112. Surety indebted to his Principal not entitled to Subrogation against him 164
113. Surety's Right confined to the Contract for which he was Surety 165
114. Surety's Right to marshal Securities given to the same Creditor for Separate Debts 167
115. Surety cannot require the Creditor to resort first to Security 168
116. Right of Subrogation destroyed by Application of the Security upon the Debt 170
117. Creditor's Right to apply Security as needed for his own Protection 170
118. Surety for Part of a Debt cannot be subrogated, while the other Part remains unpaid 172
119. Surety discharged by Creditor's giving up Security to which he would be subrogated 173
120. Creditor held to Responsibilities of Trustee for Surety . . 175
121. Laches of Creditor resulting in Loss of Security may discharge Surety 177
122. Creditor's Discharge of Levy or Attachment on the Property of the Principal, how far a Discharge of the Surety . . 179
123. Creditor bound to retain Money or Property of the Principal rightfully in his Hands 181
124. Neglect of a Bank to apply Deposits of the Principal upon his Note, how far a Release of the Surety 184
125. Rights of a Surety who has paid the Debt in Ignorance of the Creditor's Discharge of a Security 185
126. Instances where Surety discharged by Creditor's Interference with his right of Subrogation 186
126 *a*. Surety on Bond not to be discharged by Release of Security caused by Act against which Bond taken 190
127. Surety not entitled to Subrogation until the whole Debt is paid 190

PAGE
§ 128. Satisfaction is Creditor's Right; it need not come wholly from Surety 192
129. Creditor's Right to apply Security held for Several Debts until all are satisfied 193
130. Surety may come into Equity to compel Payment of the Debt by the Principal 195
130 *a*. Equitable Relief given to the Surety 196
131. Rights of Successive Sureties to Subrogation against each other 197
132. Rights of one who becomes Surety for the Payment of a Judgment . . . . , 199
133. Where Later Surety is Surety for Original Sureties as well as for Principal 201
134. Exceptions to Usual Rule of Subrogation between Successive Sureties 202
135. Whether Original Obligation extinguished by Surety's Payment thereof. Rule in England 203
136. Present English Rule generally adopted in the United States 205
137. Right of Surety to be substituted to the Benefit of the Original Obligation maintained 206
In New Hampshire 206
In Nebraska 207
In New York 207
In Pennsylvania 208
In New Jersey 208
In Delaware 208
In Maryland 209
In Virginia 209
In North Carolina 210
In South Carolina 211
In Georgia 211
In Ohio 212
In Kentucky 212
In Tennessee 213
In Mississippi 214
In Alabama 214
In Michigan 215
In Iowa 215
In Indiana 215
In Wisconsin 216
In Minnesota 216
In Kansas 216
In Illinois 216
In Missouri 216
In Arkansas 217
In Texas 217
In Louisiana 217
In California 218

PAGE
§ 138. Right of the Surety to be subrogated to the Benefit of the Original Obligation denied 218
In Vermont 219
In Massachusetts 219
In Maine 219
In Nevada 219
139. Indemnity held by a Surety discharged by his Release from Liability 219
140. Right of Subrogation among Co-sureties 220
141. Co-sureties entitled to the Benefit of Securities held by each other 222
142. A Surety cannot have Contribution from his Co-sureties without accounting for such Security 224
143. A Surety holding Security regarded as a Trustee thereof for his Co-sureties 225
144. His Rights and Liabilities towards his Co-sureties . . . 226
145. Surety may in Equity prevent Discharge of Security held by his Co-surety 227
146. Security held by one who is both a Creditor and a Surety . 228
147. Surety must contribute to Cost of Security of which he seeks the Benefit. Waiver 229
148. Right of one Surety to stipulate, on becoming such, for a Separate Indemnity to himself 230
149. A Co-surety called upon for Contribution becomes thereby entitled to Subrogation 231
150. Subsequent Sureties not entitled to Indemnity provided for Prior Sureties 231
151. Extent of the Right of Subrogation among Co-sureties. Creditor's Interference with the Right 233
152. One Surety holding Security from the Principal holds it for the Whole Debt 235
153. Co-sureties' Right of Subrogation subject to Legal Rights of Third Parties 236
154. The Creditor may be substituted to the Benefit of Security for the Debt held by a Surety 236
155. Security held by a Surety regarded as a Trust for the Payment of the Debt 238
156. Creditor's Right to Security held by a Surety who is also a Creditor of the Principal 240
157. Creditors' Right to Security held by Surety measured by that of Surety 241
158. Security given merely to indemnify Sureties cannot be enforced after Sureties discharged 243
159. When the Surety's Transfer of his Indemnity to the Creditor does not extinguish it 243
160. Surety's Indemnity not available to the Creditor unless Insolvency intervenes 244
161. Application of these Principles in Connecticut 246

PAGE
§ 162. The Creditor is entitled to the Benefit of the Surety's Indemnity when Insolvency intervenes 246
163. Surety's Indemnity sometimes treated as a Trust for the Payment of the Debt 247
164. Partial Surety not to be harmed by the Substitution of the Creditor to his Indemnity 248
165. Creditor cannot be substituted to a Security not created against his Debt 250
166. Cases in which a Creditor has sought to be substituted to Securities held by a Surety or by one under a Secondary Liability 251
167. Creditor Substituted to the Claim of his Debtor for Reimbursement upon the Party ultimately liable 252
167 *a*. Bondholder substituted to Benefit of Security given by Party ultimately liable 253
168. Substitution to the Securities held by the Sureties in a Criminal Recognizance 255

CHAPTER IV.

SUBROGATION AMONG JOINT DEBTORS 256

§ 169. Right of Joint Debtors to Subrogation as against each other 256
170. Where one Joint Debtor has assumed the Ultimate Liability 258
171. In Cases of Partnership 259
171 *a*. Substitution of a Partnership Creditor to Agreement or Security taken by a Retiring Partner against Firm Debts 261
172. Where Securities belonging to Different Owners are held for the Same Debt 264
173. Where Land of two or more Owners is subject to one Mortgage 266
174. This Principle applied against one claiming under a Joint Purchaser 267
175. Applied to Mortgagees whose Estate was subject to a Prior Lien 267
176. Not applied where Lien upon one Security extinguished . 268
177. Where the Ultimate Liability is upon one of Several Owners of Securities held for the Same Debt 269
178. These Principles applied to Joint Mortgagors and to the Grantees of a Mortgagor 270
179. Extent of the Right of Subrogation 272
180. Whether Original Obligation discharged as to all the Debtors upon Payment by one 273

CHAPTER VI.

PAGE

SUBROGATION IN THE ADMINISTRATION OF ESTATES 307

§ 202. Subrogation of Executor or Administrator to Debts and Legacies which he has paid 307
203. Such Subrogation must be seasonably claimed. Its Limitations 310
204. Subrogation in Favor of Creditors of Deceased. Marshalling of Assets 311
205. Creditors subrogated to a Charge upon Property purchased from Funds of the Deceased Debtor 312
206. Creditors subrogated to Rights of Executors to Reimbursement 313
207. Where the Creditor entitled to hold Two Funds 314
207 *a*. Subrogation between Tenant for Life and Remainderman 315
208. Subrogation in Favor of Legatees 316
209. In Favor of a Purchaser from the Personal Representative . 318
210. Where Legatees have paid Judgments against the Estate . 319
211. Subrogation in Favor of Specific Devisees and Legatees . . 320
212. Subrogation of Devisees to subsequently acquired Assets . 322
213. Rights of Heirs, Devisees, or Legatees against each other . 323
214. Specific Devise or Legacy chargeable with Expense incurred for its Protection 325
215. Rights of Heirs among themselves 326
216. Rights of Purchaser from Heir or Devisee 326
217. Creditors subrogated to the Rights of Legatees 327
218. Subrogation of Devisee or Legatee who is disappointed by the Election of another 328
219. Extent of this Right of Substitution 330
220. This does not extend to a Devise merely upon Condition . 331

CHAPTER VII.

SUBROGATION UNDER CONTRACTS OF INSURANCE 333

§ 221. Subrogation of Marine Insurers 333
222. Subrogation to the Remedy for a Tort causing the Loss . . 335
223. Limitations of this Subrogation 336
224. Does not arise upon a Compromise of the Insurer's Liability 337
225. Effect of an Abandonment 338
226. Abandonment of Ship and Freight separately insured . . 339
227. English Doctrine 340
228. Subrogation of Insurers on Freight against the Insured . . 341
229. Subrogation against a Carrier of Insured Goods 341
230. Insurer against Fire subrogated to Remedy against Railroad . 344
231. Mode of enforcing this Right 345
232. Subrogation against other Parties liable for a Loss by Fire 346

PAGE
§ 233. Subrogation of Mortgagee to Insurance procured by Mortgagor 348
234. Where a Creditor obtains Insurance upon Property on which he has a Lien 350
235. Rights of Mortgagor in Insurance obtained by Mortgagee . 351
236. Insurance obtained by Mortgagor for Benefit of Mortgagee . 353
237. Where the Policy stipulates for the Subrogation of the Insurers 354
238. Between Lessor and Lessee or Vendor and Purchaser . . 355
239. Subrogation of Life Insurers 357

CHAPTER VIII.

SUBROGATION OF STRANGERS 360

§ 240. Strangers or Volunteers not entitled to Subrogation . . . 360
241. The Voluntary Payment of a Debt by a Stranger extinguishes it 361
242. Application of this Principle to the Case of one who binds himself for a Pre-existing Debt 363
243. Application of this Principle to the Case of one who loans Money to the Debtor for the Payment of his Debt . . . 363
243 *a*. Application of this Principle to the Purchase of Coupons on Secured Bonds 365
244. Creditor not substituted to Remedy of his Debtor against a Wrong-doer 366
245. When the Person making Payment of the Debt of another regarded as a Stranger or Volunteer 367
246. Instances of the Subrogation of a Person on his paying the Debt of another 369
247. Subrogation of one paying a Debt at the Instance of the Debtor 371
248. Conventional Subrogation 372
249. Conventional Subrogation upon Payment of a Debt, and a Remedy for the Payment itself, cannot coexist 373
250. Conventional Subrogation in Louisiana 374

INDEX 377

TABLE OF CASES.

A.

SECTION

- Abbey *v.* Van Campen 102
- Abbott *v.* Baltimore Steam Packet Co. 246
  - *v.* Kasson 28
  - *v.* Powell 64
  - *v.* Union Ins. Co. 12
- Abercrombie *v.* Connor 188
- Acer *v.* Hotchkiss 1, 46
- Ackerman's Appeal 169
- Acquackanonk Water Co. *v.* Manhattan Ins. Co. 84
- Adair *v.* Brimmer 202
  - *v.* Campbell 113
- Adams *v.* Angell 57, 60
  - *v.* Brackett 211
  - *v.* Culver 129
  - *v.* Cuny 101
  - *v.* Drake 188
  - *v.* Dutton 123
  - *v.* Flanagan 131, 133
  - *v.* Friedlander 37
  - *v.* Gillespie 218
  - *v.* Gleaves 89
  - *v.* Keeler 187, 180
  - *v.* Paige 244
  - *v.* Smith 215
  - *v.* Tator 102
- Addison *v.* Burckmyer 194
- Aderholt *v.* Henry 79, 84
- Adone *v.* Seligson 189 *a*
- Ætna Bank *v.* Hollister 123
- Ætna Ins. Co. *v.* Baker 235
  - *v.* Buck 8
  - *v.* Corn 57
  - *v.* Hannibal & St. Joseph R. R. Co. 280, 239
  - *v.* Middleport 167 *a*

SECTION

  - *v.* Tyler 234
- Afton Bank *v.* Thompson 37
- Agnew *v.* Bell 141
  - *v.* Charlotte R. R. Co. 57
  - *v.* Renwick 55
- Agricultural Bank *v.* Bishop 126
- Ahern *v.* Freeman 17
- Aiken *v.* Bruen 75
  - *v.* Gale 172, 173
  - *v.* Milw. & St. Paul R. R. Co. 75
- Alabama *v.* Stanton 77
- Alabama Bank *v.* Godden 122
- Alabama Ins. Co. *v.* Anderson 154
- Albany Bank *v.* Kearney 7
- Albany Savings Institution *v.* Burdick 85
- Albert *v.* Upton 139
- Albion Bank *v.* Burns 104
- Albright *v.* Albright 64
- Alden *v.* Clark 137
- Alderman *v.* Eastern R. R. Co. 189
- Aldrich *v.* Blake 57, 155
  - *v.* Cooper 204
  - *v.* Hapgood 141
  - *v.* Willis 20
- Alexander *v.* Byrd 151
  - *v.* Ellison 87
  - *v.* Lewis 137
  - *v.* Miller 208
  - *v.* Welch 81
- Alford *v.* Cobb 86
- Allegheny R. R. Co. *v.* Dickey 201
- Allen, *ex parte* 202, 203
  - *v.* Allen 208
  - *v.* Brown 120
  - *v.* Centre Valley Co. 171
  - *v.* Clark 74, 75
  - *v.* Culver 129
  - *v.* De Groodt 207 *a*

SECTION
Allen v. Hannum 218
v. Henley 119
v. Holden 7
v. O'Donald 119
v. Ogden 138
v. Phelps 37
v. Powell 137
v. Russell 205
v. Smitherman 123
v. Thomas 171 *a*
v. Watertown Ins. Co. 237
v. Williams 11, 193
v. Wood 12
v. Woodard 115
Alliance Ins. Co. v. Louisiana Ins. Co. 6, 223
Allis v. Ware 104, 130 *a*
Allison v. Armstrong 46
v. Pattison 180
v. Sutherlin 86, 127
v. Thomas 126
Alsop v. Hutchings 78
Alston v. Batchelor 210
v. Mumford 61
Amazon Ins. Co. v. Iron Mountain 229
Ambler v Leach 122
America, The Pride of 34
American Bank v. Baker 86, 126
American Eagle, The 34
American Land Co. v. Grady 95
Ames v. Maclay 101
v. New Orleans R. R. Co. 20
v. Richardson 238
Amherst College v. Smith 66
Amory v. Lowell 1, 207 *a*
Amos v. Heatherby 202
Anderson v. Lithgo 122
v. Sharp 115
v. West 39
Andreas v. Hubbard 83
Andrews v. Bishop 211
v. Fiske 26
v. Mann 171 *a*
v. Murphy 89
v. Richardson 88
v. Varrell 101
Angell v. Boner 56
Anglade v. St. Avit 20
Ann Arbor Bank v. Webb 54
Ann, The Sarah 225
Anna, The 243
Anthony, *in re* 211
v. Percifull 142, 143

SECTION
Anthony v. Slaid 244
Antrobus v. Davidson 130
Apperson v. Wilbourn 151
Aquilar v. Aquilar 104
Arbogast v. Hays 110
Arbuthnot, *ex parte* 195
Arcedeckne, *in re* 149
Armentrout v. Gibbons 3, 36
Armistead v. Dangerfield 213
Armitage v. Baldwin 135
v. Pulver 150
v. Toll 64
Amor v. Amis 119
Armour v. Michigan Central R. R. Co. 189 *a*
Armstrong v. Cook 188
v. Fearnaw 86
v. McAlpin 12
v. Poole 115
Armstrong's Appeal 131, 182
Arn v. Hoppin 9, 36 *a*
Arnett v. Cloud 7
Arnold v. Foot 12
v. Green 14
v. Hicks 97
v. Nichols 171 *a*
Arnot v. Woodburn 86
Arnott v. Webb 180
Arrington v. Arrington 40
Artcher v. Douglass 122
Asche v. Asche 60
Ashby v. Smith 86, 122
Ashe v. Moore 65
Ashley v. Dixon 244
Ashton v. Clayton 247
Astley v. Milles 59
Athens Bank v. Danforth 14
Atherton v. Toney 26, 56
Atkins v. Emison 46
Atkinson v. Angert 49
v. Stewart 50, 51
Atlanta National Bank v. Douglass 121
Atlantic Ins. Co. v. Storrow 222
Attorney-General v. Continental Ins. Co. 197
Atwood v. Vincent 82, 87, 100
Auburn Bank v. Marshall 182 *a*
v. Throop 190
Austen v. Halsey 204
Avenue, *in re* Eleventh 34
Averill v. Loucks 69
v. Taylor 14, 45
Avery v. Clarke 185

SECTION
Ayers *v.* Adams 28
Ayers's Appeal 85
Ayers *v.* Dixon 24
  v. Husted 69

B.

Babcock, *in re* 23, 130
  v. Blanchard 87
Bachelder *v.* Fiske 142
Bacon *v.* Goodnow 11
  v. Van Schoonhoven 12
Badger *v.* Ocean Ins. Co. 225
Baer *v.* Wilkinson 171 *a*
Bailey *v.* Gibbs 7
  v. Warner 21
  v. Willard 47
Baily *v.* Brownfield 137, 171
  v. Smith 185
Baine *v.* Williams 66 *a*
Baines *v.* Barnes 101
Baird *v.* Jackson 61
Baker *v.* Briggs 86
  v. Fireman's Ins. Co. 234
  v. Marshall 122
  v. N. W. Loan Co. 56
  v. Pierson 12
  v. Terrell 24
  v. Ward 243
Baldwin *v.* Merrill 137, 180
  v. Moffett 42
  v. Norton 57
  v. Sager 79
  v. Short 40
  v. Thompson 24
Ball *v.* Setzer 61
Ballard *v.* Randall 200 *a*
Ballew *v.* Roler 97, 110
Baltimore & Ohio R. R. Co. *v.* Bitner 101
  v. Trimble 163
  v. Walker 169
  v. Wightman 239
  v. Wilkins 189 *a*
Banco de Lima *v.* Anglo-Peruvian Bank 192
Bancroft *v.* Abbott 241
Bange *v.* Flint 185
Bangs *v.* Strong 126
Bank *v.* Allen 137
  v. Buchanan 126 *a*
  v. Clute 12
  v. Douglass 159
  v. Harper 137
Bank of Alabama *v.* Godden 122

SECTION
Bank of America *v.* Senior 181
Bank of Atlanta *v.* Douglass 121
Bank of Commerce *v.* Porter 101
  v. Russell 200 *a*
Bank of England *v.* Tarleton 113
Bank of Hamburg *v.* Howard 75
Bank of Kentucky *v.* Milton 6
  v. Vance 61
Bank of Republic *v.* Millard 200 *a*
Bank of St. Albans *v.* Wood 120
Bank of Scotland *v.* Dominion Bank 10 *a*
Bankhead *v.* Owen 185
Banner, *ex parte* 195
  v. Johnston 189
Banta *v.* Garmo 20
Barber *v.* Lyon 8
Barbour *v.* Exchange Bank 130
Barclay *v.* Stirling 228
Barger *v.* Buckland 87
Barhydt *v.* Perry 171
Baring *v.* Moore 78
Barker *v.* Buel 152
  v. Flood 172
  v. Matthews 244
  v. Parker 1, 18, 22, 183
Barlow *v.* Deibert 132
  v. Myers 171 *a*
Barnard *v.* Wilson 46, 177
Barned's Banking House, *in re* 195
Barnes *v.* Boardman 172
  v. Morris 97
  v. Mott 29, 55, 77, 78
  v. Racster 65
Barnett *v.* Griffith 20
  v. Reed 110
  v. Riser 185
Barney *v.* Clark 122
  v. Grover 112
  v. Meyers 76
Barnsback *v.* Reiner 110
Barnwell *v.* Wofford 63
Barrett *v.* Amerein 46
  v. Davis 104
  v. Union Ins. Co. 236
Barrow *v.* Shields 119
Barry *v.* Mo., K. & T. R. Co. 19
Barta *v.* Vreeland 55
Bartlett *v.* McRae 171
Barton *v.* Brent 86, 127
  v. Croydon 155
  v. Moore 110
Bascom *v.* Smith 57

Section

- Bassett *v.* Avery 183
  - *v.* Bradley 24
  - *v.* Mason 59
  - *v.* McDonnell 11, 17
  - *v.* Welch 46
- Batavia Bank *v.* Ege 189
  - *v.* N. Y. R. Co. 189 *a*
- Batchelder *v.* Jenness 34
- Batchellor *v.* Lawrence 135
- Bates *v.* Blonsky 244
  - *v.* Ruddick 76
- Batione's Estate 218
- Bathgate *v.* Haskin 101
- Batsell *v.* Richards 105
- Battle *v.* Hart 102
- Baumgardner *v.* Allen 26
- Bausman *v.* Credit Guarantee Co. 128
- Bay *v.* Williams 85
- Bayard *v.* McGraw 245
- Bayles *v.* Husted 245
- Beadle, *in re* 23
- Beal *v.* Smithpeter 7
  - *v.* Stevens 20
- Beale *v.* Parish 183
  - *v.* The Bank 121
- Beall *v.* Barclay 38, 76
  - *v.* Walker 36
- Bean *v.* Boothby 57
- Beard *v.* Arbuckle 7
  - *v.* Fitzgerald 75
- Beardsley *v.* Warner 115, 130
- Beattie *v.* Dickinson 97
- Beaubien *v.* Stoney 123
- Beaver *v.* Beaver 102
  - *v.* Slanker 86
- Bechervaise *v.* Lewis 101, 119
- Beck *v.* Gallagher 11
  - *v.* Tarrant 172
- Becker *v.* Northway 101
- Beckwith *v.* Webber 181
- Beddow *v.* De Witt 75, 79
- Bedwell *v.* Gephart 119
- Begein *v.* Brehm 24
- Behn *v.* Young 63
- Beisenthal, *in re* 28
- Belcher *v.* Hartford Bank 86, 116
  - *v.* Wickersham 41, 210
- Belding *v.* Manley 185
- Belknap *v.* Dennison 60
- Bell *v.* Hepworth 66
  - *v.* Jasper 150
  - *v.* Lamkin 141
  - *v.* Sunderland Building Society 49

Section

- Bell *v.* Tenney 57
  - *v.* Woodward 28
- Bellas *v.* Fagely 171 *a*
- Bellows *v.* Allen 7, 91
  - *v.* Lovell 122
- Bellune *v.* Wallace 152
- Bender *v.* George 1, 131
- Bendey *v.* Townsend 87
- Benedict *v.* Chase 36 *a*
- Benjamin *v.* Saratoga Ins. Co. 238
- Benne *v.* Schnecko 137
- Benneson *v.* Savage 86
- Bennett *v.* Bates 26
  - *v* Coldwell 209
  - *v.* Cook 110, 111
  - *v.* Soloman 185
- Benson *v.* Chapman 227
  - *v.* Gottheimer 185
- Bentley *v.* Harris 131
  - *v.* Long 88
  - *v.* Vanderheyden 24
  - *v.* Whittemore 29
- Benton *v.* Bailey 169
- Berkshire Ins. Co. *v.* Hutchings 85
- Bernhardt *v.* Lymburner 84
- Berridge *v.* Berridge 141
- Berry *v.* Brown 171 *a*
- Berthold *v.* Berthold 137
- Bertram *v.* Cook 47
- Besley *v.* Lawrence 171
- Besser *v.* Hawthorne 57
- Beveridge *v.* N. Y. Elevated R. Co. 85
- Beverley *v.* Brooke 77
- Bibb *v.* Martin 157
- Biddell *v.* Brizzolara 85
- Bier *v.* Smith 26
- Bigelow *v.* Cassedy 12, 14, 45
  - *v.* Provost 7
- Billings *v.* Sprague 86
- Binford *v* Adams 11, 241
- Binns *v.* Nichols 64
- Binsse *v.* Paige 53
- Bird *v.* Louisiana Bank 110, 181
- Birdsall *v.* Cropsey 177
  - *v.* Hewlett 220
- Birke *v.* Abbott 35
- Birnie *v.* Main 78, 81
- Birrell *v.* Schie 20
- Biscoe *v.* Royston 185
- Bishop *v.* Day 180
  - *v.* O'Conner 3, 209
  - *v.* Rowe 186

SECTION
Branch *v.* Macon R. R. Co. 168, 167 *a*
Brandenburg *v.* Flynn 181
v. Thorndike 219
Branham *v.* San José 82
Brant *v.* Clark 165
Brant's Will 211, 213
Brass *v.* Maitland 10
Braught *v.* Griffith 137
Brazer *v.* Clark 118, 202
Bray *v.* Howard 7
Breckenridge's Appeal 202
Breedlove *v.* Stump 163
Breen *v.* Seward 185
Breese *v.* Bange 126
Breidenbecker *v.* Lowell 117
Breit *v.* Yeaton 205
Brengle *v.* Richardson 77
Bressler *v.* Martin 85
Brewer, Appeal of 132
v. Franklin Mills 187
v. Nash 81
v. Staples 24, 26
Brice *v.* Watkins 1, 5, 250
Brice's Appeal 247
Brick *v.* Buel 179
v. Freehold Banking Co. 115
Bridges *v.* Nicholson 127
Bridgman *v.* Johnson 182 *a*
Brien *v.* Smith 139
Brigden *v.* Cheever 8, 213
Briggs *v.* Boston & Lowell R. R. Co. 10
v. Langford 185
v. Planter's Bank 63
Bright *v.* Boyd 86 *a*
Brighthope Ry. Co. *v.* Rogers 229
Briley *v.* Sugg 137
Brill *v.* Tuttle 197
Brinckerhoff *v.* Lansing 177
Brindle *v.* Page 151
Brinson *v.* Cunliff 218
v. Thomas 90
Briscoe *v.* Power 82
Bristol, The 228
British Ins. Co. *v.* Gulf, Colorado & Santa Fe Ry. Co. 229
Broad, *in re* 192
Brobst *v.* Brock 81
Brockman *v.* Sieverling 120
Brooke *v.* Bordner 86 *a*
Brooks *v.* Blackburn Building Society 19
v. Carter 115

SECTION
Brooks *v.* Harwood 178
v. McDonnell 224
v. Rice 58
v. Ruff 189
Broquet *v.* Sterling 9
Brough's Estate 116, 127
Broughton *v.* Robinson 151
Brower *v.* Witmeyer 243
Brown, The J. A. 246
Brown, The Sam 223
Brown, *ex parte* 1
v. Black 137
v. Bouney 209
v. Brown 115
v. Casetes 244
v. Chambers 122
v. Cody 84
v. Decatur 186
v. East 90
v. Frost 245
v. Hodgson 1, 10
v. Houck 6
v. Kough 195
v. Lang 100
v. Lapham 49, 60, 62
v. Long 187
v. Powell Steam Co. 189 *a*
v. Rathburn 128
v. Ray 141, 146
v. Riggins 122
v. Roger Williams Ins. Co. 236
v. Simons 12, 75, 78
v. Smith 31
v. South Boston Savings Bank 73, 82
v. Stillman 85
v. Winter 85
v. Worcester Bank 74
Browne *v.* Davis 79
Brownson *v.* Lawrence 211
Bruce *v.* Bonney 248
v. Garden 239
Bruner's Appeal 63
Bruse *v.* Nelson 20
Bryan *v.* Henderson 117
Bryan-Brown Shoe Co. *v.* Block 68
Bryant *v.* Smith 188
Bryar's Appeal 49
Bryson *v.* Close 86
v. Myers 85
Buchanan *v.* Clark 170
Buckalew *v.* Smith 120
Buckingham *v.* Wesson 202

SECTION
Buckinghamshire v. Hobart 18
Buckley's Appeal 26
Buckner v. Morris 137
Budd v. Oliver 111
Buettel v. Harmount 170
Buffalo Bank v. Wood 115, 188
Buffington v. Bernard 41
Bugbee v. Sargent 220
Bugden v. Bignold 65
Bull v. Griswold 77
Bullard v. Hinckley 22
 v. Leach 58
Bullock v. Campbell 127
Bunch v. Grave 39
Bunn v. Lindsay 3, 247
Bunting v. Gilmore 29
 v. Ricks 89
Burchard v. Frazer 17, 46
 v. Phillips 19, 42
Burden v. Johnson 32, 39
Burdett v. Clay 185
Burger v. Greif 82
Burgett v. Patton 131
Burhaus v. Hutcheson 185
Burk v. Chrisman 86, 97
Burke v. Lee 137
Burlingame v. Goodspeed 235
Burnand v. Rodocanachi 224, 232, 238, 239
Burnet v. Denniston 13, 17, 45, 59
Burnett v. Lyford 185
Burns v. Huntington Bank 93, 131, 132
 v. Ledbetter 38
Burnside v. Fetzner 171
Burr v. Beers 1, 85
 v. Boyer 119, 121
 v. Smith 186
Burroughs v. United States 163
Burrows v. McWhann 137, 140
Burton v. Gibson 40
 v. Henry 75
 v. Rutherford 110
Burwell v. Fauber 217
 v Mandeville 206
 v. Snow 245
Busch v. Huston 46
Bush v. Foote 197
 v. Stamps 157
 v. Wadsworth 245
Bushong v. Taylor 89
Bussey v. Page 43
Butler v. Barnes 84

SECTION
Butler v. Birkey 170
 v. Butler 105
 v. Seward 48
 v. Stainback 64
 v. Taylor 45
Butler County v. McCann 244
Buzzell v. Still 54
Byerly v. Humphrey 19
Byington v. Fountain 47
Byles v. Kellogg 47
Byrd v. Byrd 211
 v. Jones 202
Byrne v. Hibernia Bank 249

C.

Cairo Bank v. Crocker 189
Caldwell v. Palmer 209
Calkins v. Steinbach 172
Callahan's Appeal 20
Calloway v. People's Bank 63
 v. Snapp 126
Calmes v. McCracken 20
Calvert v. Peebles 137
Calvo v. Davies 24
Cambridge Savings Bank v. Hyde 119
Cameron v. Holenshade 29
 v. Tome 19
Cammack v. Lewis 239
Campau v. Miller 4
Campbell v. Campbell 51
 v. Carter 60
 v. Elliott 6
 v. Johnson 27
 v. Knights 49
 v. Lacock 171 a
 v. McAlevy 14
 v. Pope 137
 v. Sloan 41
 v. Smith 85
 v. Texas R. R. Co. 19
 v. Trotter 20
 v. Vedder 57
Campbell Printing Press Co. v. Powell 160
Canfield v. Shear 26
Cannon v. Connaway 141
 v. Copeland 206
 v. Hudson 69
 v. Kreip 63
 v. McDaniel 154, 156
Cansler v. Sallis 20
Canton Bank v. Dubuque R. R. Co. 197
Canton Bank v. Reynolds 120

Section
Capehart v. Mhoon 245, 246
Capel v. Butler 121
Capen v. Richardson 243
Capital Savings Bank v. Reed 182 *a*
Carey v. Boyle 78, 243
Carithers v. Stewart 245
Carley v. Fox 85, 104
Carlisle v. Wilkins 155, 159
Carlisle Banking Co. v. Thompson 20
Carll v. Butman 18, 49
Carlton v. Jackson 46
  v. Simonton 118
Carnahan v. Tousey 85
Carnes v. Platt 83
Carpenter v. Bowen 154, 155
  v. Brenham 85, 57
  v. Continental Ins. Co. 235
  v. Fifield 7
  v. Gleason 58
  v. Kelly 143, 144
  v. Koons 22
  v. Longan 185
  v. Minter 86
  v. Providence Ins. Co. 234
  v. Stilwell 7
Carr v. Caldwell 20
  v. Glasscock 137
  v. Security Bank 200 *a*
  v. Sterling 122
Carraway, *ex parte* 64
Carroll v. New Orleans R. R. Co. 229
Carruthers v. West 183
Carson Opera House Ass'n v. Miller 126
Carstairs v. Mechanics' Ins. Co. 229
Carter v. Black 93
  v. Goodin 29
  v. Halifax 248
  v. Holohan 26
  v. Neal 8, 69, 70
  v. Penn 173
  v. Rockett 233
  v. Sims 97
  v. Taylor 12
Caruthers v. Hall 82
Case v. Beauregard 171
  v. Hawkins 182 *a*, 191
  v. O'Brien 83
  v. Woolley 81
Casey v. Buttolph 53
Cashman v. Martin 75
Cason v. Heath 243 *a*
  v. Westfall 128
Cass v. Martin 18

Section
Cassa Marittima v. Phœnix Ins. Co. 234
Cassebeer v. Kalbfleisch 181
Castellain v. Preston 232, 234, 238
Castle v. Floyd 34
Cathcart's Appeal 34
Cates v. Thayer 122
Cattel v. Warwick 59
Caudle v. Murphy 247
Chaffe v. Lisso 162
  v. Patterson 19
  v. Taliaferro 119
Chaffee v. Jones 150
  v. Oliver 8
Chaffin v. Campbell 131
Chalmers v. Lanion 183
Chamberlain v. N. H. Ins. Co. 236
  v. St. Paul R. R. Co. 167, *a*
Chamberlin v. McDowell 202
Chambliss v. Miller 87, 250
Champlin v. Williams 30, 36 *a*
Champney v. Coope 55, 56
Chandler v. Dyer 15
  v. Higgins 137
Chapin v. Livermore 120
Chaplin v. Baker 112
  v. Sullivan 213
Chapman v. Collins 188
  v. Jenkins 139
  v. Lester 64
  v. West 75
Charleston v. Ryan 20
Charlestown Bank v. Epstin 8
Charlotte Bank v. Homesley 122
Charlton's Appeal 202
Chase v. Welty 133
  v. Williams 45
  v. Woodbury 74
Chatham Bank c. Shipman 86
Chedel v. Millard 45
Cheek v. Waldrum 31
Cheeseborough v. Millard 61, 73, 74, 245
Cheever v. Fair 74
Chelmsford Co. v. Demarest 113
Cherry v. Miller 120
  v. Monro 45, 170, 177, 178
Chesapeake Ins. Co. v. Stark 225
Chesham, *in re* 218
Chesson v. Chesson 202
Chester v. Broderick 131
  v. Kingston Bank 86, 125
Chester Bank v. Atlanta Ry. Co. 189
Chicago v. Tebbetts 34

SECTION
Chicago Bank v. Bailey 189
Chicago, St. Louis & N. O. R. Co. v. Pullman Car Co. 282
Chichester v. Mason 121
Chickering v. Fullerton 34
Child v. New York & New England R. R. Co. 19, 127
Childress v. Allen 89
Childs v. Childs 31
v. Stoddard 20
Chilson v. Adams 101
Chilton v. Chapman 142, 143
Chinnery v. Blackburn 227
Chipman v. Morrill 169
v. Todd 151
Chittenden v. Barney 74
Chollar v. Temple 137
Choteau v. Jones 46, 102
Chouler v. Smith 8
Chrisman v. Harman 87, 108
v. Jones 131
v. State Ins. Co. 236
Christian v. Newberry 20
Christie v. Hale 20
Christmer v. Brown 104
Christy v. Fisher 47
Church, Petitioner 127
Churchill, *in re* 88
Chute v. Emmerich 86
Cilley v. Hare 45
Cincinnati Bank v. Coates 197
Cincinnati Ins. Co. v. Duffield 225
Citizens' Bank v. Carson 124
Citizens' Svgs. Bank v. Foster 15
City Bank v. Crossland 11
v. Luckie 190
v. Smiesson 6
v. Young 86, 120
City of Paris, The 221
City of Salem, The 248
Claflin v. Ostrom 171 *a*
Claiborne v. Birge 126
Clapp v. Clapp 206
v. Rice 188
Clark v. Blything 232
v. Bullard 20
v. Clark 8
v. Dearborn 12
v. Ely 155
v. Fontain 79
v. Jacobs 98
v. Mackin 45
v. McKin 20

SECTION
Clark v. McNeal 20
v. Moore 240
v. Sickles 120
v. Warren 169, 174
v. Williams 89
v. Wilson 81, 221
v. Wright 63
v. Young 121
Clarke v. Bancroft 66 *a*
v. Birley 151
v. Jenkins 202
Clason v. Morris 187
Clay v. Banks 46
Clayton v. Somers 202
Clemens v. Prout 187
Cleveland v. Farley 85
v. Southard 26
Clevinger v. Miller 7
Clews v. Bondholders 167 *a*
Clifford v. Campbell 204
Clift v. White 59
Cline v. Upton 88
Clinefelter v. Ayres 207
Clingman v. Hopkie 245
Clinton v. Hope Ins. Co. 235
Clopton v. Spratt 120
Clos v. Boppe 57
Clow v. Derby Coal Co. 123
Clowes v. Dickinson 1, 3, 77, 83
Clute v. Emmerich 19
Coates v. Pennsylvania Ins. Co. 236
Coates's Appeal 112
Cobb v. Dyer 14, 55
Cochran v. Goodell 57
v. Shields 86, 137
Cochran's Estate 185
Cockerill v. Dickens 68
Cockrill v. Armstrong 49
Cockrum v. West 9
Coe v. New Jersey Midland R. R. Co. 248
Coffee v. Tevis 137
Coffin v. Adams 85
v. McLean 101
v. Parker 78
Coffman v. Hopkins 138, 187
Cogbill, *in re* 64
Coggeshall v. Ruggles 105
Coggswell v. Stout 81
Cohn v. Hoffman 19, 57
Coker v. Shropshire 68
Colby v. Cato 79
v. Place 26

SECTION
Cole *v.* Edgerley 8, 248
v. Justice 101
v. Malcolm 3, 40
Coleby *v.* Coleby 215
Coles *v.* Appleby 56
v. Bulman 1, 10
Colgrove *v.* Tallman 25, 171
Collie, *in re* 171
Collier, *in re* 171 *a*
Collins *v.* Adams 19
v. Carlisle 169
v. Prosser 151
v. Stocking 60
v. Suau 87
v. Torry 50
Collinson *v.* Owens 202
Colt *v.* Barnes 167 *a*, 185
Colton *v.* Colton 173
Columbia Ins. Co. *v.* Lawrence 233, 234
Colvin *v.* Owens 86
Comegys *v.* State Bank 141, 144
v. Vasse 221, 222
Comins *v.* Culver 128
Commerce Bank *v.* Bogy 197
v. Porter 101
Commercial Ass. Co. *v.* Lister 232
Commercial Bank *v.* Henninger 124
v. Lewis 171 *a*
v. Pfeiffer 189
v. Western Reserve Bank 75
Commercial Warehouse Co. *v.* Graber 165
Commissioners *v.* Clark 183
Commonwealth *v.* Chesapeake & Ohio Canal Co. 19, 127
v. Miller 86, 87
v. Straton 91
Compton *v.* Oxenden 18
Comstock *v.* Drohan 24
v. Michael 85
Concord *v.* Pillsbury 101
Concord Ins. Co. *v.* Woodbury 235
Cone *v.* Donaldson 77
v. Niagara Ins. Co. 234, 236
Congregational Society *v.* Snow 156
Conn *v.* Coburn 243
Conn. Ins. Co. *v.* Bulte 12
v. Erie Railw. Co. 230
v. N. Y. & N. H. R. R. Co. 239, 244
v. Scammon 236

SECTION
Conn. Ins. Co. *v.* Tyler 85
Connely *v.* Bourg 187
Conner *v.* Howe 87, 110
v. Welch 43
v. Wells 39
Conover *v.* Conover 216
Conrad *v.* Buck 241
v. Harrison 75, 77, 84
v. Mullison 24
Conroy *v.* Woods 171 *a*
Constant *v.* Matteson 162, 163
Constantia, The 172
Converse *v.* Cook 46
v. Michigan Dairy Co. 185
v. Ware Savings Bank 75
Conway *v.* Strong 87, 137
Conwell *v.* McCowan 127, 171
Cook, *in re* 122
v. Armstrong 186
v. Berlin Woollen Mill Co. 40
v. Farrington 23
v. Hinsdale 177
v. Larkin 183
v. Lister 181
Cooke, *in re* 4
v. Cooper 31
v. Moore 6
Cooley, Appeal of 22
v. Osborne 159
v. Waterman 46
Coolidge *v.* Gloucester Ins. Co. 226
Coombs *v.* Parker 123
Coon *v.* Swan 239
Cooper *v.* Bigley 75
v. Jenkins 127
v. Middleton 154
v. Newland 34
v. Pepys 182
v. Wilcox 86, 122
Copis *v.* Middleton 129, 185
Corbally *v.* Hughes 8, 36
Corbett *v.* Waterman 24
Corcoran *v.* Allen 202
Cordaman *v.* Malone 119
Corey *v.* Leonard 125
v. White 201
Cornell *v.* Hichens 185
v. Prescott 24, 172, 177
Cornwall *v.* Gould 110
Cornwell's Appeal 110
Corwin *v.* Collett 58
Cory *v.* Leonard 117
Coster, *in re* 9, 12, 13

SECTION
Cotton *v.* Sterling 183
Cottrell *v.* Finney 19
Cottrell's Appeal 3, 87, 137, 245
Couch *v.* Delaplaine 212
Couchman *v.* Maupin 171
Coudert *v.* Coudert 36 *a*, 55
Courtenay *v.* Wright 239
Coutant *v.* Servoss 78
Covey *v.* Neff 127
Cowan *v.* Duncan 183
  v. Telford 155
Cowden's Estate 77
Cowgill *v.* Linville 89
Cox *v.* Earle 184
  v. Garst 49, 51
  v. N. Y. Mid. R. Co. 127
  v. Wheeler 22
Coyle *v.* Davis 80
Crafts *v.* Crafts 177
  v. Mott 102, 170
Craigmales *v.* Gamble 76
Cralle *v.* Meem 204
Crane *v.* March 185
Cranmer *v.* McSwords 211
Crawford *v.* Carver 14
  v. Edwards 85
  v. Gaulden 122
  v. Logan 181
  v. Richeson 4, 75, 110
Craythorne *v.* Swinburne 150
Creager *v.* Brengle 137
Creanor *v.* Creanor 34, 185
Creath *v.* Creath 64
  v. Sims 122
Creecy *v.* Pearce 51
Crescent City Ice Co. *v.* Stafford 30
Crim *v.* Fleming 112, 128
Crippin *v.* Chappel 20
Crisfield *v.* Murdock 140
  v. State 137
Crist *v.* Brindle 101
Critten *v.* Chappel 8
Crocker *v.* Gilbert 115
Croft *v.* Bunster 185
  v. Moore 1, 140
  v. Williams 202
Crompton *v.* Vasser 142
Cronin *v.* Hazletine 27, 57
Croone *v.* Bivens 130
Crosby *v.* Chase 58
  v. Crafts 155
  v. Farmers' Bank 81
  v. Taylor 40, 53

SECTION
Cross *v.* Allen 126
  v. Truesdale 85
Crouch *v.* Edwards 210
Crow *v.* Murphy 131
Crowell *v.* Currier 85
  v. St. Barnabas Hospital 85
Crowley *v.* Harader 26, 47
  v. Mellon 202
Crozier *v.* Grayson 105
Crumlish *v.* Railroad Co. 20
Crump *v.* McMurtry 118
Cullum *v.* Emanuel 87, 119, 126
  v. Mobile Bank 15, 154
Cumberland *v.* Coddrington 211
Cummings *v.* Little 86
Cunningham *v.* Anderson 209
  v. Brown 244
  v. Clarkson 113
  v. Evansville R. Co. 282
  v. Macon R. R. Co. 167 *a*
  v. Smith 137
Curan *v.* Colbert 122
Curcier *v.* Phila. Ins. Co. 225
Curry *v.* Curry 245
  v. Hale 24
  v. Mack 121
Curtis *v.* Gooding 31
  v. Tyler 85
Cushing *v.* Ayer 74
  v. Thompson 235
Cutbush *v.* Cutbush 206
Cutcheon *v.* Buchanan 40
Cuyler *v.* Ensworth 137, 140

D.

Da Costa *v.* Comfort 85
Daigle's Succession 126, 172
Dalby *v.* India Life Ins. Co. 239
Dale *v.* Grant 244
  v. McEvers 13
Daley *v.* Proetz 20
Dalton *v.* Woburn Association 117, 126
Danville Poor District *v.* Montour County 11
Dana *v.* Conant 138
Danforth *v.* Robinson 102
Daniel *v.* Baxter 48
  v. Hunt 154
  v. Joyner 131, 154, 155
Dargan *v.* McSween 46

SECTION
Darling *v.* Harmon 12
Darrell *v.* Tibbetts 232, 238
Darst *v.* Bates 12, 87, 127
  v. Thomas 1, 9, 11
Dart *v.* Sherwood 101
Daub *v.* Englebach 85
Dauchy *v.* Bennett 22
Davenport *v.* Hardeman 86, 137
Davenport Plow Co. *v.* Mewis 61
Davidson *v.* Carroll 86
  v. Case 227
Davies *v.* Humphreys 127
Davis *v.* Barrett 54
  v. Clark 37
  v. Cook 12
  v. Flagg 45
  v. McCurdy 102
  v. Perrine 201
  v. Pierce 28
  v. Rogers 15
  v. Roosvelt 31, 86 *a*
  v. Smith 99, 185
  v. Stevens 137
  v. Toulmin 142
  v. Townsend 46
  v. Walker 61
  v. Wetherell 51
  v. Winn 15, 17
Davy *v.* Hallett 226
Dawes *v.* Cammus 75
Dawson *v.* Lee 245, 246
  v. Pettway 188
  v. Real Estate Bank 124
Day *v.* Mooney 57
  v. Ramey 122
Dayhuff *v.* Dayhuff 185
Dayton *v.* Rice 47
De Ende *v.* Wilkinson 214
De Lisle *v.* Herbs 49
De Meza's Succession 100
De Mott *v.* Stockton Paper-ware Co. 187
De Negre *v.* Ham 64, 136
De Tastet, *ex parte* 182
De Wolf *v.* Capital City Ins. Co. 235
  v. Gardner 189
  v. Lindsell 185
Dean *v.* Hart 218
  v. King 189 *a*
  v. Toppin 24
Dearborn *v.* Taylor 49, 86
Dearnaley *v.* Chase 31
Dearth *v.* Hide & Leather Bank 182

SECTION
Deavitt *v.* Judevine 75
Decatur *v.* Walker 58
Deck *v.* Works 120
Decker *v.* Hall 49
Dehn *v.* Heckman 201
Deichman *v.* Arndt 215
Deitzler *v.* Mishler 109
Delaney *v.* Tipton 127
Delaware & Hudson Canal Co. *v.* Bonnell 57
Delaware Co.'s Appeal 61
Delaware, Lack. & W. R. R. Co. *v.* Gilbert 206
Delgado *v.* Wilbur 189
Delp *v.* Bartholomay Brewing Co. 85
Deming *v.* Merchant's Cotton-Press Co. 229
Dempsey *v.* Bush 87, 137
Denham *v.* Williams 63
Denier *v.* Myers 181
Denman *v.* Jayne 21
  v. Nelson 12
Dennis *v.* Gillespie 151
  v. Rider 138
Denny *v.* Lincoln 160
  v. Lyon 104
  v. Palmer 188
Dent *v.* Waite 131
Denzler *v.* O'Keefe 56
Denton *v.* Cole 247
  v. Nanny 51
Dering *v.* Winchelsea 136, 151
Dessar *v.* King 133
Detroit Bank *v.* Haug 68 *a*
Detroit Ins. Co. *v.* Aspinall 19
Detroit Savings Bank *v.* Truesdail 68
Deuster *v.* McCamus 78
Dever, *ex parte* 196
Devol *v.* McIntosh 171 *a*
Devereux *v.* Fairbanks 21
Devin *v.* Eagleson 14
Devine *v.* Harkness 13, 44
Dewey *v.* Ingersoll 81
  v. Living 113
Dewhurst, *ex parte* 194
Dewthorpe, The 172
Dias *v.* Bouchaud 88
Dibrell *v.* Dandridge 182 *a*, 201
Dick *v.* Franklin Ins. Co. 237
  v. Maury 185
  v. Moon 86
  v. Truly 162
Dickason *v.* Williams 26, 59

Section
Dunlop, *in re* 92
  v. Avery 233
Dunn *v.* Olney 63
  v. Parsons 182 *a*
Dunning *v.* Fisher 85
  v. Leavitt 85
Dunphy *v.* Riddle 58
Dupuy *v.* McMillan 88
Durac *v.* Ferrari 250
Durand *v.* Truesdell 187
Durant *v.* Davis 243
Durbin *v.* Kuny 169
Durham *v.* Craig 157
  v. Rhodes 207 *a*, 210
Durnherr *v.* Rau 85
Durvall *v.* Febiger 49
Dutcher *v.* Hobby 31
Dutton *v.* Ives 28
  v. McReynolds 20
Dwight *v.* Scranton Lumber Co. 112
Dye *v.* Mann 141

E.

Eagle Beneficial Society's Appeal 17
Eagle Ins. Co. *v.* Pell 42
Eagle, The American 34
Eakin *v.* Knox 171
East River Bank *v.* Rogers 101
Easterly *v.* Auburn Bank 1
Eastman *v.* Crosby 245
  v. Foster 155, 164
  v. Plumer 186
Eaton *v.* George 26
  v. Hasty 1, 111
  v. Lambert 105
  r. Simonds 52
Ebelmesser *v.* Ebelmesser 209
Ebenhardt's Appeal 77, 86
Ebert *v.* Gerding 64
Echols *v.* Head 123
Eddy *v.* Traver 216
Edge *v.* Goulard 75
Edgerly *v.* Emerson 1, 187
Edgerton *v.* Young 57
Edgeworth Co. *v.* Wetherbee 186
Edinburg Mortgage Co. *v.* Latham 19
Edmonds *v.* Sheahan 151
Edmunds *v.* Harper 101
  v. Venable 89
Edward Oliver, The 61
Edwards *v.* Applegate 75, 77

Section
Edwards *v.* Clement 85
  v. Davenport 19
  v. Frank 8
  v. Helm 156
  v. Thom 20
  v. West 238
Egerton *v.* Alley 97
Eggeman *v.* Eggeman 20
Eisenburg *v.* Albert 104
Elam *v.* Rawson 137
Elder *v.* Commonwealth 246
Eldridge *v.* Wright 11, 21
Eleventh Avenue, *in re* 34
Eliason *v.* Eliason 213
Ellerhorst, *in re* 182
Ellicott *v.* Ellicott 203
Ellis *v.* Fisher 101
  v. Johnson 82
  v. Lindley 20
  v. Roscoe 97
Ellison *v.* Pecare 75
Ellsworth *v.* Lockwood 8, 6, 45
Elwell *v.* Quash 202
Elwood *v.* Deifendorf 77, 102, 106, 141
Ely *v.* Ely 238
  v. McNight 47
  v. Stannard 25
Emigrant Savgs. Bank *v.* Clute 8, 12
Emley *v.* Mount 85
Emmons *v.* Bradley 63
Emory *v.* Baltz 101
Enders *v.* Brune 1, 86, 88
Engle *v.* Haines 82
Engles *v.* Engles 169
English & American Bank, *ex parte* 171
Ennis *v.* Harmony Ins. Co. 236
Entwistle, *in re* 195
Eppes *v.* Randolph 187
Erb's Appeal 107, 187
Erie Savings Bank *v.* Roop 104, 114
Erwin *v.* Acker 12
Essex County Bank *v.* Bank of Montreal 200 *a*
Estabrook *v.* Smith 26
Esty *v.* Graham 185
Evans *v.* Billingsley 7
  v. Bremridge 151
  v. Burns 54
  v. Duncan 212
  v. Evans 206
  v. Halleck 203
  v. Kimball 53

Section
Evans *v.* Kneeland 101
v. Moore 137
v. Raper 122
v. Robertson 4
v. Saunders 12
Evansville Gas Co. *v.* State 82
Evarts *v.* Hyde 7
Everett *v.* Beebe 44
Everley *v.* Rice 86
Everston *v.* Central Bank 19
v. Kansas Bank 8
v. McMullen 49, 55
Evertson *v.* Booth 185
v. Tappan 205
Ewart *v.* Latta 127
Exall *v.* Partridge 12
Excelsior Ins. Co. *v.* Royal Ins. Co. 234
Exchange Bank *v.* Jones 121
v. Rice 85
v. Silliman 129
v. Stone 185
Exline *v.* Lowery 163

F.

Fagan *v.* Jacocks 141
Fair *v.* Brown 46
Fairclough *v.* Pavia 183
Fairfield *v.* McArthur 37
Fairman *v.* Heath 213
Fallas *v.* Pierce 46
Falley *v.* Gribling 213
Farebrother *v.* Wodehouse 127, 129
Fargo *v.* Ames 171
Farley *v.* Cleveland 85
Farmers' Bank *v.* Erie R. R. Co. 245
v. Grantham 7
v. Kingsley 122
v. Sherley 111
v. Teeters 141
Farmers' Ins. Co. *v.* German Ins. Co. 20
Farmers' Loan Co. *v.* Carroll 42, 44
Farrar *v.* Kramer 126
v. Parker 101
Farrell *v.* Lewis 14, 185
Farwell *v.* Becker 187
v. Ensign 181
v. Importers' Bank 62
Fassett *v.* Mulock 75
Faulks *v.* Dimock 46

Section
Faurott *v.* Neff 3
Fawcetts *v.* Kimmey 86
Fay *v.* Fay 241
Fayerweather *v.* Phœnix Ins. Co. 229
Feamster *v.* Withrow 7, 105
Fears *v.* Albea 19
Feemster *v.* Good 202
Fegley *v.* McDonald 87, 119
Fellows *v.* Dow 53
Felton *v.* Bissel 140
Fenaille *v.* Coudert 126
Ferguson *v.* Glassford 20
Ferre *v.* American Board 220
Ferrer *v.* Barrett 97
Ferris *v.* Crawford 24
v. Van Vechten 217
Ferry *v.* Laible 206
Fessler *v.* Hickernell 171
Fiacre *v.* Chapman 14
Fickett, *in re* 162
Fidelity Ins. Co. *v.* Southern Va. R. R. Co. 20
v. West Penn. Ry. Co. 243 *a*
Fidelity Title Co. *v.* People's Gas Co. 232
Field *v.* Crawford 85
v. Hamilton 127, 170
Fielder *v.* Varner . 117
Fielding *v.* Waterhouse 137, 148
Fields *v.* Sherrill 86
Fievel *v.* Zuber 19
Finch *v.* Shaw 216
Findlay *v.* Trigg 203
v. United States Bank 62, 138
Fink *v.* Mahaffy 4, 110
Finn *v.* Stratton 7
Firestone *v.* State 8
First Congregational Society *v.* Snow 156
First National Bank *v.* Crabtree 189
v. Rogers 101
v. Whitman 200 *a*
First National Bank of Madison *v.* Schlusser 155
First National bank of Marquette *v.* Weed 195
Firth *v.* Denny 219
Fischer *v.* Hope Ins. Co. 85
Fish *v.* French 185
Fishback *v.* Bodman 111, 131
v. Weaver 141
Fisher *v.* Dillon 173

SECTION
Fisher *v.* Johnson 36 *a*
v. Skillman 202
Fishkill Bank *v.* Speight 124
Fiske *v.* McGregory 24
v. Tolman 26
Fitch *v.* Cotheal 104
Fitchburg Savings Bank *v.* Torrey 119
Fitzgerald *v.* Barker 85
Fitzpatrick *v.* Hill 181
Fitzsimmons's Appeal 34
Flachs *v.* Kelly 12
Flagg *v.* Geltmacher 24
v. Mason 172
v. Thurber 24
Flanigan *v.* Sable 57
Flannary *v.* Utley 8
Fleischauer *v.* Doellner 85
Fleishel *v.* House 79
Fleming *v.* Beaver 137, 140
v. Parry 41
Fletcher *v.* Chase 74
v. Grover 151
v. Jackson 149
v. Menken 132
Flint *v.* Cadenasso 85
Florida Internal Improvement Co. *v.* Greenough 214
Floyd *v.* Goodwin 137
v. Ort 171 *a*
Fluker *v.* Bobo 137
Flynn *v.* North American Ins. Co. 236
Fockeo *v.* Weirsheeher 19
Fogartles *v.* State Bank 200 *a*
Foley *v.* Robards 118
Follansbee *v.* Johnson 85
Folsom *v.* Carli 201
Folts *v.* Ferguson 209
Fonner *v.* Smith 200 *a*
Foot, *in re* 61, 171
Forbes *v.* Jackson 86, 87, 129
v. Moffatt 13, 54
Ford *v.* Geauga County 78
Fordyce *v.* Hicks 40
Fore *v.* Manlove 39
Forest Oil Co.'s Appeal 4, 45
Forrest *v.* Luddington 167 *a*
Fort *v.* Union Bank 1
Fort Worth Bank *v.* Daugherty 137, 180
Foss *v.* Chicago 119
Foster, Succession of 203
v. Athenæum 187
v. Crenshaw 218

SECTION
Foster *v.* Equitable Ins. Co. 237
v. Gaston 123
v. Strong 185
v. Union Bank 84
v. Van Reed 237
Fouch *v.* Wilson 20
Fouche *v.* Swain 57
Fourth City Building Society *v.* Williams 20
Fourth National Bank's Appeal 156
Fowle *v.* Torrey 171 *a*
Fowler *v.* Barksdale 77
v. Fay 57, 60
v. Gate City Bank 199
v. Parsons 9, 36 *a*
v. Scully 108
Fowler, The Frank G. 229
Fox, *in re* 61
v. Alexander 89
v. Hudson 115, 122
Foye, *in re* 162
Francis *v.* Herren 75, 79
v. Smith 171 *a*
Francisco *v.* Shelton 24
Franklin *v.* Armfield 214
Franklin County Bank *v.* Greenfield Bank 200
Franklin Savings Bank *v.* Taylor 6
Franklin Savings Institution *v.* Central Ins. Co. 233
Franklyn *v.* Hayward 53
Franks *v.* Morris 46
Frary *v.* Booth 203
Frazee *v.* Inslee 20
Frazier *v.* McQueen 136
Freanor *v.* Yingling 122
Frederick *v.* Gray 220
v. Moore 151
Freeman *v.* Buckingham 189 *a*
v. McGaw 243
v. Mebane 98
v. Paul 13, 57
v. Tompkins 214
French *v.* De Bow 20
v. Edwards 180
v. Grenet 30
v. Sheplor 243
v. Turner 185
Fretland *v.* Mack 47
Frevert *v.* Henry 188
Frey *v.* Vanderhoof 47
Friberg *v.* Donovan 131
Friedlander *v.* Texas Ry. Co. 189 *a*

SECTION
Friemansdorf *v.* Watertown Ins. Co. 232, 236
Friends Society *v.* Haines 85
Fries *v.* Ennis 171 *a*
Frink *v.* Hampden Ins. Co. 236
Frische *v.* Kramer 31
Frith *v.* Forbes 193, 195
Frost *v.* Frost 169
v. Yonkers Bank 15, 17
Frothingham *v.* Prince 221, 225
Frow's Estate 171
Fry *v.* Hammer 8, 19
Frye *v.* Bank of Illinois 46
Fulcher *v.* Daniel 34
Fulkerson *v.* Brownlee 97
Fuller *v.* Hollis 248
v. Lamar 57
v. Loring 115
Fulton *v.* Hughes 171 *a*
v. Nicholson 4
Funk *v.* McReynolds 22
Furiman *v.* McMillian 172
Furnas *v.* Durgin 24
Furnold *v.* Missouri Bank 1, 137, 140
Fuselier *v.* Babineau 151

G.

Gabbert *v.* Wallace 185
Gable *v.* Scarlett 85
Gadsden *v.* Brown 1, 3, 240, 242
Gage *v.* Ward 19
Gahn *v.* Neimcewicz 104
Gaines *v.* Kennedy 209
Gales *v.* Hailman 229
Gallagher, Appeal of 213
v. Redmond 218
Galliher *v.* Galliher 36
Gammell *v.* Mulford 69
Gannaway *v.* Tarpley 205
Gannett *v.* Blodgett 127
Gans *v.* Thieme 1, 19
Gantz *v.* Toles 75
Garden *v.* Ingram 238
v. Morrow 169
Gardenville Ass'n *v.* Walker 243
Gardere *v.* Columbian Ins. Co. 225
Gardiner *v.* Smith 225
Gardner *v.* Astor 13, 55
v. Emerson 17
v. James 17
v. Way 138

SECTION
Garfield *v.* Foskett 179
Garland, *ex parte* 206
Garnsey *v.* Rogers 85
Garrett *v.* Garrett 110, 112
Garrison *v.* Memphis Ins. Co. 229
Garrow *v.* Maxwell 7
Garth *v.* McCampbell 7
Garvin *v.* Garvin 137
v. Mobley 171 *a*
v. State Bank 197
Garwood *v.* Eldridge 29
Gary *v.* Bank of State 91
v. Cannon 115
v. Hignutt 115
Gaskill *v.* Sine 78
v. Wales 20
Gaskins *v.* Blake 46
Gates *v.* Adams 75
v. Hughes 171
v. Whetstone 202
Gatewood *v.* Gatewood 48
Gaultney *v.* Nolan 202
Gaussen *v.* United States 121
Gautgert *v.* Hoge 85
Gaw *v.* Huffman 202
Gay *v.* Blanchard 25
Gearhart *v.* Jordan 172, 180
Geddis *v.* Hawk 115
Gedye *v.* Matson 128
Gee *v.* Pack 100
Gegner *v.* Warfield 69
Geib *v.* Reynolds 20
Geller *v.* Hoyt 61
General Ins. Co. *v.* U. S. Ins. Co. 63
General Rolling Stock Co., *in re* 196
General South American Co., *ex parte* 194
Geoghegan *v.* Ditto 39
George *v.* Andrews 24
v. Cooper 51
v. Kent 75
v. Wood 74, 81
Georgetown *v.* Smith 39
Georgia Bank *v.* Jauncey 198
Georgia Chemical Works *v.* Cartledge 15
Georgia Ins. Co. *v.* Dawson 221, 229
Georgia Pacific R. R. Co. *v.* Walker 75
Gerber *v.* Sharp 93
Gerdine *v.* Menage 26, 36 *a*
Gerdone *v.* Gerdone 118
German American Savings Bank *v.* Fritz 137

SECTION

German Bank *v.* Foreman 124
  v. Fourhaw 182 *a*
German Savings Institution *v.* Adae 200 *a*
Germania Building Assoc. *v.* Neill 59
Germania Ins. Co. *v.* Memphis R. R. Co. 229
Gerrish *v.* Bragg 18, 20
Gerwig *v.* Shetterly 20
Gettysburg Bank *v.* Thompson 121
Ghiselin *v.* Fergusson 87, 97, 109
Gibbes *v.* Greenville & Columbia R. Co. 20, 167 *a*
Gibbons *v.* Hoag 17
Gibson *v.* Crehore 49, 51
  v. McCormick 35
  v. Seagrim 61
Gifford, *ex parte* 151
  v. Corrigan 85
Gilbert *v.* Cooley 31
  v. Gilbert 8, 36 *a*
  v. Haire 75
  v. Hoffman 40
  v. Neely 89
  v. Port 238
  v. Sanderson 85
Gill *v.* Downing 237
Gill *v.* Morris 101
Gillespie *v.* Campbell 182 *a*
  v. Cresswell 105
  v. Darwin 120
  v. Torrance 101
Gillett *v.* No. Am. Ins. Co. 245
  v. Wiley 126 *a*
Gillette *v.* Hill 7
Gilliam *v.* Esselman 127, 130
Gillians *v.* McCormack 63
Gillman *v.* Henry 25
Gilman *v.* Gilman 218
Gipson *v.* Ogden 122
Girard Ins. Co. *v.* Stewart 26
Gist *v.* Cockey 202
  v. Pressley 61
Giveans *v.* McMurtry 42
Given *v.* Marr 55
Givens *v.* Nelson 150
Glass *v.* Pullen 61, 72, 127
Glassell *v.* Coleman 113
Glazier *v.* Douglass 123
Gleason *v.* Dyke 21
Glide *v.* Dwyer 214
Globe Ins. Co. *v.* Sherlock 223
Goddard *v.* Whyte 86

SECTION

Godsall *v.* Boldero 239
Goembel *v.* Arnett 171 *a*
Goldman *v.* Biddle 171 *a*
Goldsmith *v.* Holmes 181
Gomez, *ex parte* 192
  v. Lazarus 199
Goodacre *v.* Skinner 123
Goodall *v.* Polhill 184
  v. Wentworth 169
Goodbar *v.* Daniel 39
  v. Dun 39
Goodbody *v.* Goodbody 202
Goodburn *v.* Stevens 207
Goode *v.* Cummings 12
Goodenow *v.* Jones 85
Goodloe *v.* Clay 141, 143
Goodman *v.* Litaker 182 *a*
  v. White 8
Goodwin *v.* Keny 53
Goodyear *v.* Goodyear 46
  v. Watson 187
Gordan *v.* Wansey 137
Gordon *v.* Bell 72
  v. English 43
  v. Moore 151
  v. Mulhare 185
Gore *v.* Townsend 104
Gorham, *in re* 171 *a*
Goring *v.* Shreve 80
Gorton, *in re* 110
Gossin *v.* Brown 87, 110
Goswiler's Estate 110
Gotleib *v.* Cranch 239
Gottschalk *v.* Neal 185
Gould *v.* Central Trust Co. 172
  v. Citizens' Ins. Co. 225
  v. Fuller 148
  v. Hayden 186
  v. Marsh 185
  v. Winthrop 211
Goulding *v.* Bunster 46
Gouverneur *v* Lynch 75
Governor *v.* Rayley 10 *a*
Grabenheimer *v.* Rindskopf 171 *a*
Graff's Estate 70
Graham *v.* Dickinson 212
  v. Dunnigan 12
  v. Firemen's Ins. Co. 237
  v. Jones 202
  v. Ledda 225
  v. Londonderry 104
  v. Newman 185
Grand Trunk Ry. Co. *v.* Jennings 239

Section
Granite Bank *v.* Fitch 1, 182
Grant, *in re* 248
  v. Lloyd 40
  v. Ludlow 7, 159
  v. Lyman 23
  v. Parsons 64
Grapengether *v.* Fejervary 21
Grassly *v.* Reinback 185
Grave *v.* Bunch 47
Graves *v.* Am. Live Stock Ins. Co. 236
  v. Graves 84, 213
  v. Hampden Ins. Co. 236
  v. Hicks 207
Gray *v.* Boston Gas Co. 244
  v. Nelson 60
Graydon *v.* Church 155
Green *v.* Crockett 97
  v. Currier 53
  v. Dodge 155
  v. Givan 205
  v. Hart 185
  v. Kimble 244
  v. Mann 122
  v. Millbank 19, 75, 149
  v. Ramage 65
  v. Tanner 12
  v. Wynn 129
Greenbaum *v.* Austrian 51
Greene *v.* Ferrie 87
Greenfield Savings Bank *v.* Stowell 151
Greenlaw *v.* Pettit 170
Greenleaf *v.* Ludington 160
Greenlee *v.* McDowell 68
Greenough *v.* Littler 28
Greenwell *v.* Heritage 1, 26
Greer *v.* Bush 4
  v. Chester 19
  v. Wintersmith 180 *a*
Gregory *v.* Bartlett 81
  v. Murrell 141
Greiner, Estate of 180, 203, 245
  v. Greiner 179
Grellet *v.* Heilshorn 57
Gresham *v.* Ware 57
Gretton *v.* Haward 219
Grieff *v.* Steamboat Stacy 122
Griff *v.* Steamboat Stacy 91
Griffin *v.* Hampton 187
  v. Orman 2, 171, 240
  v. Proctor 1, 243
Griffith *v.* Buck 171 *a*
  v. Depew 98
  v. Lovell 76

Section
Griffith *v.* Townley 11, 44
Grigg *v.* Banks 12
Grim's Appeal 213
Grimes *v.* Kimball 20
Gring's Appeal 110
Grisard *v.* Hinson 120
Grissom *v.* Commercial Bank 124
Griswold *v.* Jackson 119
  v. Marshman 12, 16
Groesbeck *v.* Matteson 78
Grosvenor *v.* Atlantic Ins. Co. 235
Grove *v.* Brien 137
Grover *v.* Thatcher 34, 53
Groves *v.* Steel 86, 96
Grow *v* Garlock 119
Grubbe *v.* Wisors 118
Gruhn *v.* Richardson 185
Guckenheimer *v.* Angevine 44
Guckian *v.* Riley 19, 36 *a*
Guernsey *v.* Kendall 29
Guesnard *v.* Louisv. & Nashv. Ry. Co. 10
Guggenheim *v.* Rosenfeld 101
Guier *v.* Kelly 3, 213
Guild *v.* Butler 86, 119, 182 *a*
Guion *v.* Knapp 75, 78, 81
Gulf, Col. and Santa Fé R. Co. *v.* Zimmerman 229
Gundry *v.* Henry 202
Gunn *v.* Geary 113
Gunnis *v.* Weigley 182 *a*
Gunter *v.* Gunter 54
Gusdorf *v.* Ikelheimer 61
Gusson *v.* Hinson 120
Guy *v.* Blanchard 25
  v. Du Uprey 3, 20, 241
Guyton *v.* Flack 171
Gwin *v.* Selby 171
Gwinn *v.* Smith 14

H.

Haberton *v.* Bennett 126
Hackensack Savings Bank *v.* Terhune Mfg. Co. 36 *a*
Hadji, The 229
Hadley *v.* N. H. Ins. Co. 234, 236
Hagemann's Appeal 34
Hagerman *v.* Sutton 185
Hagerstown Bank *v.* Adams Express Co. 10

Section
Hagey *v.* Hill 182 *a*
Haggery *v.* Byrne 57
v. McCanna 19
Hahn *v.* Behrman 75
Haine *v.* Tarrant 243
Hait *v.* Ensign 20
Halcombe *v.* Loudermilk 39
Hall *v.* Cresswell 105
v. Cushman 148
v. Edwards 81
v. Hall 127, 169
v. Howard 169
v. Hoxsey 86, 115
v. Morgan 26, 82
v. Nashville & Chat. R. R. Co. 1, 6, 229
v. Roberts 171 *a*
v. Robinson 141, 142, 148
v. Smith 106
v. Southwick 46, 52
v. Stevenson 69
v. Taylor 7
Halsey *v.* Reed 85
v. Worden 189
Halstead *v.* Westervelt 220
Hamblen *v.* Folts 185
Hamburg Bank *v.* Howard 75
Hamilton *v.* Dobbs 14
v Hamilton 218
v. Lubukee 185
v. Schwehr 61
Hamilton Bank *v.* Halstead 40
Hammatt *v.* Wyman 188
Hammel *v.* Queen's Ins. Co. 236
Hammer *v.* Johnson 238
Hammock *v.* Baker 131
Hammond *v.* Barclay 190
v. Barker 20, 46, 55
v. Essex Ins. Co. 226
v. Hammond 213
v. Leavitt 21
v. Myers 110
Hampton *v.* Levy 121
v. Nicholson 209
v. Phipps 157
Hanby *v.* Henritse 131
Hancock *v.* Fleming 28
v. Holbrook 110
v. Minot 202, 213
Hand *v.* Kennedy 85
v. Savannah and Charleston R. R. Co. 167 *a*
Hanford *v.* Bockee 104
Hanford *v.* Robertson 117
Hanger *v.* State 22
Hanlon *v.* Doherty 20
Hannah *v.* Guy 186
Hannay *v.* Pell 130
Hannegan *v.* Hannah 61
Hanner *v.* Douglass 131, 137
Hansen *v.* Rounsavell 117
Hanson *v.* Hanson 207
v. Manley 117
Hapgood *v.* Cornwell 171 *a*
Harbeck *v.* Vanderbilt 110
Hardcastle *v.* Commercial Bank 128
Hardin, *ex parte* 46
v. Clark 46
v. Eames 120
v. Melton 75
Harding *v.* Tiffit 117
v. Townshend 232, 239
Hardman *v.* Brett 232
Hards *v.* Burton 170
Hardware Co. *v.* Deere 130
Hardy *v.* Overman 114
Harger *v.* McCullough 201
Hargthorpe *v.* Millforth 202
Harlan *v.* Jones 36 *a*
v. Sweeney 115, 127
Harland *v.* Person 218
Harlem Savgs. Bank *v.* Micklesburgh 82
Harmony Bank's Appeal 187
Harner's Appeal 20
Harnsberger *v.* Yancey 1, 150
Harper *v.* Ely 15
v. Kean 121
Harrall's Case 104
Harrington *v.* Fulton 6
v. Ward 91
Harris, *ex parte* 182
v. Fly 21
v. Frank 137
v. Harrison 89
v. Jex 26
v. Rivers 101
v. Warner 133
v. White 213
v. Wynne 187
Harris, The William A. 248
Harrisburg Bank *v.* German 86
Harrison *v.* Bisland 1, 5, 241, 250
v. Courtauld 182 *a*
v. Guerin 75, 78, 82
v. Harrison 172
v. Henderson 101

SECTION
Hewitt, *in re* 1, 105
  v. Adams 151
Heyder *v.* Excelsior Blg. Ass'n. 20
Heyman *v.* Dubois 86, 114
Hibernia Ins. Co. *v.* St. Louis Transpn. Co. 229
Hickie, case of 194
  v. Rodocanachi 227
Hickman *v.* McCurdy 151
Hicks *v.* Bailey 105
  v. Bingham 78
  v. M'Garry 85
  v. Newport Ry. Co. 239
  v. Wyatt 171 *a*
Higdon *v.* Bailey 123
Higgins *v.* Glass 7
  v. Wright 154, 157
Higgs *v.* Landrum 131
High *v.* Brown 75
Higham *v.* Harris 172
Highland *v.* Highland 86
Hightower *v.* Rigsby 185
Hiles *v.* Coult 75
Hill *v.* Beebe 20
  v. Billingsley 209
  v. Bourcier 121
  v. Huston 171
  v. Manser 134, 137
  v. McCarter 82
  v. Mellon 204
  v. Royds 194
  v. Sewell 91
  v. Voorhies 86, 110
  v. West 12
Hillegas *v.* Stevenson 182 *a*, 188
Hilton *v.* Crist 143
Himes *v.* Keller 137, 151
Himrod *v.* Baugh 101
Hinchman *v.* Emans 20
Hinckley *v.* Kreitz 131
Hinds *v.* Ballou 28, 49
Hiner *v.* Newton 101
Hines *v.* Dresher 31
  v. Potts 246
Hinsdill *v.* Murray 140
Hinton *v.* Odenheimer 171
Hiscock *v.* Jaycox 23
Hoare *v.* Cazenove 184
Hobbs *v.* Harvey 20
Hobson *v.* Bass 100
  v. Edwards 185
Hocker's Appeal 213
Hodges *v.* Armstrong 137

SECTION
Hodges *v.* Hickey 64, 69
  v. Hightower 1
Hodgson *v.* Hodgson 151
  v. Shaw 86, 94, 129, 185
Hoff's Appeal 75
Hoffman *v.* Butler 182 *a*
Hogan *v.* Moore 183
  v. Reynolds 171, 180
Hogue *v.* Davis 188
Hoke *v.* Jones 86
Holbrook, *in re* 171
  v. Am. Ins. Co. 235
  v. United States 221
Holcombe *v.* Richm. & Danv. R. R. Co. 230
Holden *v.* Pike 57, 75
Holland *v.* Citizens' Savings Bank 45
  v. Johnson 120
Holliday *v.* Brown 87, 129
Holliman *v.* Rogers 181
Hollingsworth *v.* Floyd 128, 137
  v. Pearson 137, 180
  v. Tanner 122, 123
Hollister *v.* Stewart 19
Holman *v.* Bailey 59
  v. Norfolk Bank 81
Holmes *v.* Bacon 155
  v. Bailey 189
  v. Day 11, 134
  v. German Security Bank 189
  v. McGinty 185
Holt *v.* Baker 20
  v. Bodey 86, 122
  v. Manier 122
  v. Penacook Savings Bank 155
Holten *v.* Lake County 28
Holway *v.* Gilman 185
Home Ins. Co. *v.* Oregon R. & N. Co. 232
Home Ins. Co. *v.* Western Transportation Co. 221
Homer *v.* New Haven Savings Bank 160
Homestead Co. *v.* Valley R. R. Co. 241
Homœopathic Ins. Co. *v.* Marshall 20
Honaker *v.* Shough 81
Honore *v.* Lamar Ins. Co. 235
Hood *v.* Hayward 151
  v. Phillips 54
  v. Spencer 171 *a*
Hook *v.* Richardson 7
  v. Richeson 103
Hooper *v.* Henry 46

SECTION
Hoover *v.* Epler 1, 8, 240, 246
Hope *v.* Wilkinson 211
Hopewell *v.* Cumberland Bank 157, 160
Hopkins *v.* Beebe 195
v. Farwell 105
v. Wolley 26
Hopkins Mfg. Co. *v.* Aurora Ins. Co. 236
Hopkinson *v.* Forster 200 *a*
Hopkinsville Bank *v.* Rudy 127, 131
Hopkirk *v.* McConico 120
Hopper *v.* Conyers 205
Hoppes *v.* Hoppes 180 *a*
Hoppock *v.* Ramsay 57
Hornby *v.* Cramer 45
Horning's Appeal 81
Horstman *v.* Gerker 185
Horton *v.* Kelly 40, 64
Hosking *v.* Smith 20
Hosmer *v.* Campbell 81
Hostetter *v.* Alexander 185
Hough *v.* Ætna Ins. Co. 241, 246
House *v.* Thompson 69
Houston *v.* Huntsville Bank 113
Houston Bank *v.* Ackerman 11
Houston Ry. Co. *v.* Bremond 92
Howard, *in re* 182
v. Gresham 185
v. North 88, 89
Howard Ins. Co. *v.* Halsey 77
Howe *v.* Frazer 134
v. Freidheim 159
v. Lawrence 171 *a*
v. Peabody 151
v. Woodruff 46
Howe Machine Co. *v.* Woolley 126
Howell *v.* Bush 20
v. Cobb 130
v. Crane 188
v. Reams 187, 140
Hoy *v.* Bramhall 78, 81, 82
Hoyle *v.* Cazabat 5, 250
Hoys *v.* Penn 69, 170
Hoysradt *v.* Holland 24, 47
Hoyt *v.* Doughty 171 *a*
Hoyt *v.* Wilkinson 106
Hubbard *v.* Ascutney Mill Dam Co. 45, 178, 175
v. Ensign 26
v. Ogden 104
v. Pace 119
Hubbell *v.* Carpenter 110, 126
Hudgins *v.* Hudgins 209

SECTION
Hudson *v.* Carmichael 104
v. Gray 214
Huebsch *v.* Scheel 59
Huey *v.* Pinney 130
Huff *v.* Farwell 76
Huffmond *v.* Bence 220
Hughes *v.* Commonwealth 246
v. Littlefield 93
Hugunin *v.* Cochrane 49
Hull, *in re* 23
v. Godfrey 15
v. Hull 30
v. Sherwood 137
Hume *v.* Scruggs 40
Humphrey *v.* Arabin 239
v. Hayes 120
v. Hitt 122
Humphreys *v.* Allen 19
v. Crane 120
Humphries *v.* Shaw 213
Hungerford *v.* Scott 241
Hunnicutt *v.* Sumney 11
Hunsucker *v.* Smith 51
Hunt *v.* Ewing 77
v. Haskell 10
v. Hunt 58
v. Mansfield 75, 77, 84
v. Miss. Central R. R. Co. 189 *a*
v. Townsend 61
Hunter *v.* Beach 62
v. Bosworth 205
v. Clark 120
v. Dennis 51
v. Richardson 139
v. United States 86, 88
Huntress *v.* Patten 101
Hurd *v.* Eaten 61
v. Little 182 *a*
v. Spencer 86, 122
Hurley *v.* Hurley 172
Hurt *v.* Reeves 86
v. Riffle 42
v. Wilson 84
Hurtin *v.* Phœnix Ins. Co. 225
Huse *v.* Ames 102
v. Den 81
Hustisford Ins. Co. *v.* Chicago Ry. Co. 230
Huston's Appeal 86, 107
Hutchings *v.* McCauley 113
Hutchins *v.* Carleton 57
v. Nichols 120
Hutchinson *v.* Swartsweller 20

SECTION
Hutchinson v. Wells 26
  v. Woodwell 119
Hutson v. Saddler 86 a
Hutton v. Campbell 122
  v. Lockridge 75
Huyler v. Atwood 85
Hyman v. Devereux 185

I.

Idaho, The 189
Ide v. Churchill 151
Iglehart v. Crane 75, 78, 81
Ijames v. Gaither 156
Indiana Bank v. Anderson 185
Indiana County Bank's Appeal 107
Ingalls v. Morgan 61, 72, 77, 78
Ingersoll v. Jeffords 9, 86 a
Ingle v. Culbertson 81
Ingles v. Walker 168, 171 a
Inman v. So. Car. Ry. Co. 229
Ins. Co. v. Easton 229
  v. Fidelity Title Co. 232
  v. Stinson 234
  v. Updegraff 235
International Bank v. Wilthire 57
International Life Ass. Co., *in re* 68
International Trust Co. v. Boardman 234
Iowa County v. Foster 20
Iowa Loan Co. v. Holderbaum 207
  v. Mowery 66
Irby v. Livingston 88
Ireland v. Miller 216
Irick v. Black 86, 180
Ives v. Merchants' Bank 117
Ives, The Frederick E. 229

J.

Jack v. Harrison 5
Jackson v. Blodgett 185
  v. Bowen 31
  v. Bolyston Ins. Co. 1
  v. Davis 88
  v. Evans 57
  v. Farmers' Ins. Co. 236
  v. Patrick 122
  v. Relf 59
  v. Roberts 170
  v. Rutledge 185

SECTION
Jackson v. Sloan 75
  v. Summerville 40
Jackson Ins. Co. v. Boylston Ins. Co. 229
Jacocks v. Bosman 207 a
Jacques v. Fackney 87, 245
James v. Brown 81
  v. Burbridge 36 a
  v. Day 25
  v. Hubbard 68, 77, 78, 88
  v. Jacques 86
  v. Johnson 13
  v. Morey 57
  v. Yaeger 180
Jarmon v. Wiswall 85
Jarratt v. Martin 101
Jarvis v. Frink 60
Jaycox, *in re* 188
Jefferson v. Edrington 51
Jeffries v. Allen 19
Jellison v. Halloran 31
Jemison v. Governor 151
Jemmison v. Gray 244
Jenkins v. Continental Ins. Co. 18, 45
  v. Freyer 77, 216
  v. Hawkins 185
  v. McNeese 86, 122
Jenness v. Robinson 3, 215
Jennings v. Jennings 218
  v. Vickers 74, 185
Jennison v. Parker 121
Jephson v. Maunsell 121
Jerauld v. Trippett 122
Jerome v. Seymour 47
Jersey City, The 245
Jervis v. Smith 68
Jewett v. Baily 153
Jobe v. O'Brien 77
John v. Jones 143, 144
Johns v. Reardon 104
Johnson, Appeal of 67
Johnson, *in re* 206
  v. Amano Lodge 137
  v. Barrett 19
  v. Bartlett 86, 100
  v. Bell 81
  v. Carpenter 185
  v. Clarke 206
  v. Corbett 202
  v. Elliot 14
  v. Goss 211
  v. Henagan 202
  v. Monell 26

SECTION
Johnson *v.* Moore 44, 244
v. Morrison 111
v. North British Ins. Co. 235
v. Parmely 85
v. Payne 14
v. Rice 78
v. Robarts 192
v. Robertson 31, 36 *a*
v. Sandhoff 31
v. Vaughn 142, 143
v. Walter 82
v. Webster 60
v. Williams 78
v. Young 119
v. Zink 26, 45
Johnston *v.* Belden 137
Joliet & Chicago R. R. Co. *v.* Healy 105
Jones *v.* Blanton 150
v. Bradford 151
v. Broadhurst 181
v. Covington 4
v. Davids 135
v. Dow 64
v. Findley 123
v. French 209
v. Gibson 88
v. Gilbert 51
v. Hawkins 120, 122
v. Higgins 85
v. Johnson 167
v. Jones 74
v. Lockard 19
v. Maney 78
v. McKenna 31, 36
v. McKinnon 137
v. Myrick 75
v. Parker 20
. Parks 85
. Phelan 77
. Quinnipiac Bank 160, 161
. Smith 31
v. Tincher 86, 87
v. Walker 206
v. Wilson 7
v. Woodstock Iron Co. 209
v. Zollicoffer 68
Jordan *v.* Adams 105, 151
v. Hamilton Bank 72
v. Hudson 137
Joslyn *v.* Grand Trunk Ry. Co. 189
v. King 10
Josselyn *v.* Edwards 24, 100

SECTION
Joyce *v.* Joyce 110
Judah *v.* Judd 3
Judge *v.* Vogel 185
Judson *v.* Dada 75
Julian *v.* Beal 89
Jumel *v.* Jumel 29, 211
v. Marine Ins. Co. 225
Junker *v.* Rush 110

K.

Kahnweiler *v.* Anderson 197
Kaiser *v.* Lembeck 19
Kalschener *v.* Upton 20
Kane *v.* Hibernia Ins. Co. 236
v. State 137, 168
Kassing *v.* International Bank 164
Kattengell, *in re* 191
Katz *v.* Moessinger 137
Keedle *v.* Flack 85
Keel *v.* Larkin 102
v. Levy 104
Keely *v.* Cassidy 1
Keene *v.* Munn 75, 211
Keim *v.* Robeson 46
Keirsted *v.* Avery 75
Keith *v.* Hudson 97
Kelchner *v.* Forney 245
Kellar *v.* Williams 181
Keller *v.* Ashford 85
v. Hannah 20
Kellogg *v.* Ames 56
v. N. Y. Central R. R. Co. 239
v. Rand 75, 79
Kelly *v.* Ala. and Cin. Ry. Co. 167 *a*
v. Duff 36 *a*
v. Herrick 162, 164
v. Jenness 56
v. Kelly 1
v. Longshore 18
v. Page 151
v. Whitney 73
Kemmerer, Appeal of 126, 127
v. Wilson 121
Kemp *v.* Kemp 34
Kendall, *ex parte* 69
v. Brown 37
v. Niebuhr 79, 81
v. Woodruff 79
Kendig *v.* Landis 68
Kendrick *v.* Forney 105

SECTION
Kennedy *v.* Baltimore Ins. Co. 225
  v. Brossiere 86
  v. Pickens 89
Kenny *v.* Gage 61
Kentucky Bank *v.* Milton 6
  v. Vance 61
Kentucky Ins. Co. *v.* Western R. R. Co. 229
Kenworthy *v.* Sawyer 120
Kenyon *v.* Segar 49
Keohane *v.* Smith 185
Keokuk *v.* Love 86, 128, 130
Ker *v.* Wauchope 218
Kernochan *v.* N. Y. Ins. Co. 235
Kerns *v.* Chambers 148
Kerr *v.* Hamilton 58
Kesler *v.* Linker 120
Ketchum *v.* Crippen 18
  v. Shaw 50
Key *v.* Griffin 218
Keyes *v.* Brush 162, 164
  v. Wood 185
Kidder *v.* Page 63, 73
Kieser *v.* Baldwin 58
Kiessig *v.* Allspaugh 123
Kilborn *v.* Robbins 47, 74, 82
Kilpatrick *v.* Dean 86
  v. Dye 27
Kimball *v.* Noyes 171 *a*
Kimble *v.* Esworthy 20
Kimmel *v.* Lowe 137
Kinard *v.* Baird 110, 137
Kindt's Appeal 122
King *v.* Aughtrey 137
  v. Baldwin 86
  v. Blackmore 137
  v. Brown 31
  v. Cushman 214
  v. Dwight 1, 2, 250
  v. Harman 154, 162
  v. King 50
  v. McVickar 19, 63, 81
  v. Morris 220
  v. Nichols 61
  v. Preston 238
  v. State Ins. Co. 234
  v. Stetson 49
  v. Whiteley 85
Kingman *v.* Soule 100
Kingsbury *v.* Westfall 126
Kinley *v.* Hill 116
Kinnaird *v.* Trollope 24
  v. Webster 86, 123, 124

SECTION
Kinnaird *v.* Williams 218
Kinnear *v.* Lowell 3, 24
Kinney *v.* Ensign 57
  v. Harvey 202
  v. Knoebel 209
Kinsey *v.* McDearmon 154
Kinsley *v.* Davis 55
Kip *v.* Mutual Ins. Co. 234
  v. New York Bank 162
Kirby *v.* Studebaker 120
Kirkham *v.* Smith 13
Kirkland, *in re* 3, 35
Kirkman *v.* Bank of America 87
Kirkpatrick *v.* Howk 86
Kistler *v.* Mosser 17
Kitchell *v.* Mudgett 8, 20, 241
Klapworth *v.* Dressler 85
Klaucke, Matter of 23
Kleimann *v.* Geiselmann 241
Klein *v.* Ragland 243
  v. Union Ins. Co. 235
Kleiser *v.* Scott 87, 97, 109
Klingensmith *v.* Klingensmith 151
Klippel *v.* Shields 137
Klock *v.* Cronkhite 59
Klopp *v.* Lebanon Bank 87, 92
Klous *v.* Hennessy 244
Knapp *v.* Sturges 6
Kneeland *v.* Moore 46
Knight *v.* Charter 122
  v. Morrison 137
Knighton *v.* Curry 128
Knoblauch *v.* Fogelsong 25, 45
Knouf's Appeal 1, 69
Knowles *v.* Lawton 53, 76
  v. Rablin 14
Knox *v.* Easton 28
  v. McCain 24
  v. Turner 239
Kobbe, The Augustine 243
Koehler *v.* Farmer's Bank 115
Konig *v.* Bayard 184
Kost *v.* Bender 183
Kostenbader *v.* Spotts 26
Krafts *v.* Creighton 113
Krall *v.* Campbell Printing Press Co. 137
Kramer *v.* Carter 169
  v. Sandford 188
Kramer's Appeal 200
Kreider *v.* Isenbice 110
Krueger *v.* Ferry 22
Kuhn *v.* North 241

SECTION
Kuhns *v.* Bankes 185
Kunkel *v.* Fitzhugh 155, 166
Kyner *v.* Kyner 1, 127

L.

La Farge *v.* Halsey 101
La Farge Ins. Co. *v.* Bell 78, 81
La Grange *v.* Merrill 132, 133
Labeaume *v.* Sweeny 106
Laboyteau *v.* Swigert 112
Lacy *v.* Rollins 151
Lackey *v.* Steere 122
Lafayette Bank *v.* Hill 124
Lafayette County *v.* Hixon 119
Lago *v.* Van Doren 17
Lahmers *v.* Schmidt 34
Laible *v.* Ferry 206
Laing *v.* Byrne 85
Lake *v.* Brutton 86, 87
Lall *v.* Matthews 39
Lamb *v.* Donovan 85
  v. Mason 21
  v. Montague 6, 45, 49
  v. Richards 14
  v. Smith 40
  v. Stone 244
  v. Tucker 85
  v. West 36 *a*
Lambert, *ex parte* 184
  v. Ghiselin 183
  v. Hobson 208
  v. Leland 20
Lamberton *v.* Windom 121
Lambton, *ex parte* 195
Lamport *v.* Beeman 211
Lamson *v.* Drake 14, 45
Lancaster *v.* Evors 104
Lancaster Mills *v.* Merchants' Cotton Press Co. 229
Lancefield *v.* Iggulden 213
Lancey *v.* Clark 186
Landry *v.* Victor 116
Lane *v.* Hallum 21
  v. Spiller 102
  v. Stacey 141
Lang *v.* Brevard 121
Langford *v.* Perrin 150
Langley *v.* Chapin 241
Lanoy *v.* Athol 61, 219
Large *v.* Van Doren 17
Lasher *v.* Williamson 101

SECTION
Lasselle *v.* Barnett 8
Lathrop's Appeal 71
Latiolais *v.* Citizens' Bank 85
Latrobe *v.* Tierman 216
Laurence *v.* Towle 26
Lausman *v.* Drahos 81
Laval *v.* Rowley 187
Law *v.* East India Co. 123
Lawes *v.* Bennett 238
Lawrence *v.* Fox 85, 165
  v. Montgomery 37
Laylin *v.* Knox 177
Lazarus *v.* Henrietta Bank 104
Le Blanc, Matter of 193
Le Noir *v.* Winn 137
Le Page *v.* McCrea 171
Leak *v.* Gay 64
Leake *v.* Ferguson 86, 106, 134, 187
Leary *v.* Cheshire 141
Leatham *v.* Terry 228
Leathers, The T. P. 105
Leavenworth *v.* Cooney 51
Leavitt *v.* Pratt 28
Lee *v.* Baldwin 121
  v. Buck 61, 75
  v. Gregory 64
  v. Griffin 127
  v. Salter 10
  v. Stone 17
  v. Swepson 8
Lee County *v.* Fulkerson 7
Leeds *v.* Chatham 238
Leers, *ex parte* 182
Leffingwell *v.* Fryer 78
Leggett *v.* Humphreys 113
  v. McClelland 143, 148
Lehman *v.* Central R. R. Co. 189 *a*
Lehow *v.* Simonton 171 *a*
Leib *v.* Stribling 65
Leithauser *v.* Baumeister 171
Lennig's Estate 85, 211
Lenox *v.* Leverett 184
Leport *v.* Todd 39
Leppo *v.* Gilbert 47
Leslie *v.* French 239
Lester *v.* Given 200 *a*
Lett *v.* Guardian Ins. Co. 237
Levi, Case of 193
  v. Welsh 40
Levy *v.* Baer 250
  v. Martin 8, 19
Lewis *v.* Armstrong 151
  v. Baer 250

SECTION
Lewis *v.* Caperton 3
v. Chittick 14
v. Faber 87
v. Furgerson 141
v. Hinman 54, 55, 64, 81
v. Lewis 112, 218
v. McMillen 101
v. Mott 34
v. Nichols 208
v. Overby 216
v. Palmer 1, 86, 104
v. Sawyer 85, 160
Libby *v.* Tufts 79
Liberty, The 229
Lidderdale *v.* Robinson 186, 137
Liggett *v.* Himle 20
v. Pennsylvania Bank 182 *a*
Lightbrown *v.* McMyn 185
Lightfoot *v.* Lightfoot 207
Lilford *v.* Keck 208
Lillard *v.* Puckett 181
Lilly *v.* Palmer 59
Lily *v.* Dunn 247
Lime Rock, The 243
Lincoln *v.* Bassett 115
Lindsay, *in re* 195
Lingle *v.* Cook 100
Linscott *v.* Lamart 64
Lintz *v.* Thompson 7
Liverpool & Gt. Western Stmp. Co. *v.* Phœnix Ins. Co. 229
Livingston *v.* Anderson 88
v. Columbian Ins. Co. 226
v. Freeland 78, 216
v. Livingston 218
v. Newkirk 202, 207
v. Peru Iron Co. 87
v. Van Rensselaer 144
Lloyd *v.* Galbraith 1, 65, 69
Lochenmyer *v.* Fogarty 87
Lock *v.* Fulford 75
Locke *v.* Homer 24
Lockett *v.* James 40
Lockhart *v.* Reilly 185
Lockwood *v.* Bassett 20
v. Marsh 8, 19, 247
v. Sturdevant 18, 57
Loder's Case 162
Loehr *v.* Colburn 154
Loewenthal *v.* McCormick 19, 248
Logan *v.* Anderson 63
v. Mitchel 160
v. Talbot 141
Logan *v.* Taylor 34
Logansport *v.* Case 81
London Ass. Co. *v.* Sainsbury 6, 232
Loney *v.* Courtnay 31
Long *v.* Joplin Mining Co. 209
v. Kaiser 88
Longan *v.* Carpenter 185
Longfellow, *in re* 1, 23
Loomer *v.* Wheelwright 126
Loomis, Appeal of 208
v. Fay 123
v. Knox 34
Loos *v.* Wilkinson 40
Loring *v.* Bacon 150
Loud *v.* Lane 14, 58
Loudon *v.* Coleman 69
Loughridge *v.* Bowland 87, 102
Louisiana National Bank *v.* Laveille 189 *a*
Lovelace *v.* Webb 22
Lovell *v.* Nelson 176
Loverin *v.* Humboldt Safe Dep. Co. 46
Low *v.* Blodgett 86, 137
v. Smart 141
Lowe *v.* Rawlins 31
Lowell *v.* French 182
Lower *v.* Buchan Bank 151
Lowery *v.* Byers 178
Lowndes *v.* Chisholm 87
v. Pinckney 110
Lowry *v.* McKinney 75
v. Smith 24
Lucas County *v.* Roberts 126
Lucht *v.* Behrens 206
Lucking *v.* Wesson 12
Luke *v.* Lyde 227
Lumley *v.* Gye 244
Lumpkin *v.* Mills 86, 186, 137
Lumsden *v.* Leonard 120, 122
Lusk *v.* Hopper 128
Lydecker *v.* Bogert 57
Lyles *v.* Lyles 213
Lyman *v.* Little 74
v. Lyman 75
Lynch *v.* Bragg 101
v. Hancock 75, 118
v. Kirby 26, 206
v. Kitchen 5
v. Pfeiffer 54
Lynn *v.* Richardson 110
Lyon *v.* Bolling 201
v. Huntington Bank 121

Section
Matthews v. Aikin 1, 93
  v. Colburn 113
  v. Joyce 154
  v. Pass 244
  v. Switzler 117
Mattingly v. Sutton 102
Mattison v. Marks 15
Matzen v. Shæffer 30
Maure v. Harrison 154
Maxfield v. Schwartz 171 a
Maxwell v. Owen 180
May, *in re* 171
  v. Burke 87
  v. Chapman 188
  v. White 86, 119
Maybee v. Tregent 189 a
Maybury v. Grady 206
Mayer v. Clark 171
Mayhew v. Boyd 182 a
  v. Crickett 87
Mayo v. Merrick 82
McAfee v. McAfee 81
McArthur v. Gordon 220
  v. Martin 64, 87
McBeth v. McIntyre 159
McBride, *in re* 4, 15
  v. Marine Ins. Co. 225
McCabe v. Bellows 45, 51, 52
  v. Swap 50, 52
McCall v. Evans 122
McCammon v. Warrell 31
McCampbell v. McCampbell 218
McCarthy v. Abel 227
McCarty v. Christie 46
McCasky v. Graff 40
McClain v. Sullivan 14, 54
McClaskey v. O'Brien 57, 65, 75
McClelland v. Davis 89
McCloskey v. O'Brien 82
McClure v. Andrews 8
McCollum v. Hinckley 154
McConnell v. Beattie 127
  v. Scott 180
McCormick v. Bauer 59
  v. Digby 185
  v. District of Columbia 183
  v. Irwin 11, 87
  v. Knox 28
McCormick's Appeal 63
McCoun v. Sperb 118
McCoy v. Wilson 100
McCracken v. German Ins. Co. 187, 196
McCready v. Van Antwerp 172

Section
McCreery v. Shaffer 64
McCrory v. Parks 151
McCrossen v. Harris 57
McCullough v. Staver 16
  v. Wise 202
McCullum v. Turpie 75
McCune v. Belt 146, 188
McDaniels v. Flower Brook Manufg. Co. 86, 103, 106
  v. Lee 137
McDermott v. Mitchell 137
McDevitt's Appeal 64
McDonald v. Black 232
  v. Dougherty 137
  v. Holmes 171
  v. Magruder 110
  v. Whitfield 181
McDonald Manufacturing Co. v. Moran 101
McDougald v. Dougherty 137
McDougall v. Brokaw 215
McDowell v. Wilmington Bank 86, 124
McElhaney v. Shoemaker 58
McFait's Appeal 220
McFillin v. Hoffman 104
McGay v. Keilback 244
McGee v. Wallis 209
McGhee v. Ellis 39
McGill, *in re* 36
McGinniss's Appeal 1, 4, 65
McGiven v. Wheelock 47
McGuire v. Wilkinson 17
McIlvain v. Mutual Assurance Co. 81
McIntier v. Shaw 46
McIntyre v. Miller 180
  v. Parks 74
McKay v. Green 207
McKeage v. Hanover Ins. Co. 34
McKechnie v. Ward 120
McKee v. Amonett 137
  v. Scobee 102
McKeen v. Haseltine 20
McKensie v. Farrell 126
McKenty v. Universal Ins. Co. 239
McKenzie v. McKenzie 20
  v. Wiley 122
McKim v. Aulbach 202
  v. Demmon 151
McKinney v. Miller 75
McKinniss v. Estes 82
McKinnon v. Thompson 218
McKinstry v. Curtis 22
  v. Mervin 58

SECTION

McKnight *v.* Bradley 102
McLaughlin *v.* McDaniel 89
McLean *v.* Cadwalader 28
  v. Lafayette Bank 138
  v. Martin 88
  v. Tompkins 12
  v. Towle 24
McLewis *v.* Furgerson 141
McLung *v.* Beirne 77, 86, 184, 187
McMahon *v.* Allen 183
  v. Fawcett 141
  v. Russell 49
McMillan *v.* Bull's Head Bank 102
  v. Gordon 248
McMullen *v.* Cathcart 113
  v. Hinkle 86, 120, 122
  v. Neal 155
McMullin *v.* Brown 213
McMyn, *in re* 135
McNairy *v.* Eastland 137
McNally *v.* Weld 215
McNeale *v.* Reed 104
McNeil *v.* Miller 29
  v. Morrow 89
McNeill *v.* McNeill 97, 202
McNeilly *v.* Cooksey 110
  v. Patchin 188
McPherson *v.* Meek 93
  v. Talbot 150
McPike *v.* Wells 218
McQuie *v.* Peay 185
McRady *v.* Thomas 155
McShane *v.* Howard Bank 123, 126 *a*
McSorley *v.* Larissa 34
McVeigh *v.* Sherwood 78
McWhorter *v.* Wright 152
McWilliams *v.* Bones 19, 42
Meacham *v.* Steele 57, 88
Mead, Appeal of 19
  v. Engs 188
  v. Mercantile Ins. Co. 229
Meador *v.* Meador 86
Mechanics' Bank *v.* Hazard 201
  v. Seitz 186
Mechanics' Bdg. Ass'n *v.* Conover 65
Mechanics' Savings Bank *v.* Goff 85
Medley *v.* Elliott 46
Medsker *v.* Parker 104
Meech *v.* Ensign 85
Meher *v.* Cole 38
Meier *v.* Meier 81
Mellen *v.* Whipple 85
Mellendy *v.* Austin 119

SECTION

Memphis & Little Rock R. R. Co. *v.* Dow 15
Menderback *v.* Hopkins 7
Menominie, The 243
Mercantile Ins. Co. *v.* Calebs 229
  v. Clark 221, 222
  v. Corcoran 223
Mercer *v.* Cross 185
Merchants' Bank *v.* Cordevoille 120
  v. McLaughlin 61
  v. State Bank 34
Merchants' Ins. Co. *v.* Mazange 238
Meriden Bank *v.* Stone Ins. Co. 236
Merriam *v.* Rauen 31
Merrell *v.* Johnson 40
Merriken *v.* Godwin 187, 181
Merrill *v.* Green 85, 171, 171 *a*
Merriman *v.* Social Mfg. Co. 118
Merritt *v.* Hosmer 14
  v. Richey 74
Merryman *v.* State 91
Mertens *v.* Winnington 184
Messer *v.* Swan 148
Messervey *v.* Barelli 61
Metropolitan Trust Co. *v.* N. Y. R. R. Co. 85
Mexall *v.* Dearborn 57
Meyer *v.* Burritt 7
  v. Lathrop 25
  v. Lowell 171 *a*
  v. Mintonye 1
  v. Peck 189 *a*
Michigan Bank *v.* Gardner 189
Mickle *v.* Rambo 78
Mickles *v.* Dillage 47, 56
  v. Townsend 47
Mickley *v.* Tomlinson 76
Micou *v.* Ashurst 25
Middaugh *v.* Batchelder 26
Middleton *v.* Marshalltown Bank 86
Middletown Bank *v.* Middletown Academy 75
Midland Banking Co. *v.* Chambers 110
Mifflin County Bank's Appeal 187
Milam *v.* Ragland 202
Miles *v.* Bacon 105
Milholland *v.* Tiffany 20
Millard *v.* Baldwin 85
  v. Harris 202
Miller, Appeal of 202, 214
  v. Aldrich 15
  v. Birdsong 205

SECTION
Miller v. Cherry 102
  v. Cook 69, 88
  v. De Peyster 225
  v. Dyer 91
  v. Fasler 82
  v. Hall 31
  v. Hannibal & St. Jo. R. R. Co. 189 *a*
  v. Holland 75
  v. Howry 152
  v. Hoyle 34
  v. Jacobs 67
  v. Lancaster 154, 167
  v. Miller 109
  v. Montgomery 117
  v. O'Kain 136
  v. Pendleton 86, 137
  v. Rogers 75
  v. Sawyer 141, 144, 146
  v. Stout 6, 86, 93, 137
  v. Thompson 85
  v. Wack 166
  v. White 115
  v. Whittier 3, 15
  v. Winchell 1
  v. Woodfall 225
  v. Woodward 88
Millerd v. Thorn 25, 171
Milligan's Appeal 62
Mills v. Comstock 18
Millsaps v. Bond 75
Millspaugh v. McBride 53
Miltenberger v. Beacom 238
Mirehouse v. Scaife 211
Miss. & Mex. Gt. S. Canal Co. v. Noyes 6
Missouri Bank v. Matson 122
Mitchell v. Bass 141
  v. Blain 213
  v. Burton 151
  v. Butt 248
  v. DeWitt 182
  v. Mitchell 3, 110, 210
Mitchelson v. Smith 64
Mix v. Hotchkiss 14
Mobile Bank v. Hunt 57
Mobile Ins. Co. v. Brame 239
  v. Huder 78
Mobile R. R. Co. v. Jurey 229
Moffit v. Roche 104
Mogan's Estate 214
Mohle v. Tschirch 34
Mollan v. Griffith 208

SECTION
Monmouth Ins. Co. v. Hutchinson 230, 231
Monroe Bank v. Gifford 86
Monson v. Drakeley 133, 150
Montana, The 229
Montgomery, Succession of 155
  v. Vickery 46
Montgomery Bank v. Albany Bank 136
Monticello v. Mollison 222
Montpelier Bank v. Dixon 122
Moody v. Moody 243
Moon v. Jennings 172
Moore v. Beasom 12
  v. Bond 20
  v. Bray 86, 140
  v. Campbell 138
  v. Foote 49
  v. Holcombe 43
  v. Larriter 131
  v. Moberly 156
  v. Moore 148
  v. Robinson 189 *a*, 195
  v. Shurtleff 82
  v. State 169
  v. Topliff 130
  v. Trimmier 78
  v. Wright 63
Moore's Appeal 26
Moorhead's Appeal 102
Moorman v. Wood 122
Moran v. Abbey 241
Morehead v. Duncan 154
Morgan v. Davis 137
  v. Dodd 159
  v. Francklyn 157
  v. Hammett 19
  v. Smith 101
Morgan's Co. v. Texas Central R. R. Co. 243 *a*
Morland v. Isaac 239
Morley v. Dickinson 86, 122
  v. Metamora 89
  v. Stevens 130
Mornyer v. Cooper 183
Morrill v. Morrill 166
Morris, *ex parte* 162
  v. Beecher 20
  v. Evans 86, 137
  v. Lake 241
  v. Mowatt 211
  v. Oakford 3, 24
  v. White 20
  Canal Co. v. Van Vorst 120

Section
Morrison v. Beckwith 76
v. Citizen's Bank 122
v. Kurtz 63
v. Marvin 137
v. Morrison 56
v. Parsons 227
v. Poyntz 142
v. Tenn. Ins. Co. 235
Morrow v. Morrow 206
v. Peyton 169
v. U. S. Mortgage Co. 248
Morse v. Bassett 56
v. Brockett 47
v. Smith 12
v. Williams 134, 138
Morsell v. Caroline 86
Morss v. Gleason 171
Morton v. Grafflin 63
v. Lowell 154
v. Welborn 38
Moseley v. Ely 206
v. Floyd 202
v. Norman 206
Mosely v. Marshall 211
Moses v. Dallas District Court 85
v. Ela 188
v. Murgatroyd 162
Mosher v. Hotchkiss 117
Mosier v. Norton 15
Mosier's Appeal 1, 3, 12, 36 *a*, 245
Moss, Estate of 63
v. Craft 122
v. Pettengill 122
Motley v. Harris 110, 128
v. Manufacturers' Ins. Co. 236
Moulton v. Beauchamp 101
Mount v. Potts 75
v. Suydam 45, 205
Mower's Trusts, *in re* 61
Mowry v. Charlestown Ins. Co. 225
Moye v. Albritton 203
Mueller v. Dobschuetz 120
Muir v. Berkshire 30, 33, 36 *a*
v. Craig 39
Muirhead v. Kirkpatrick 121
Muldoon v. Crawford 89
Mulford v. Estudillo 122
v. Peterson 57
Muller v. Wadlington 126, 185
Mumper v. Kelly 85
Munroe v. Crouse 46
Murdock v. Chapman 34
Murphree v. Countiss 243

Section
Murphy v. Adams 34
v. Glass 101
Murray v. Catlett 87
v. Fox 78
v. Marshall 26
Murrell v. Scott 120
Murtha v. Curley 244
Muscatine v. Miss. R. R. Co. 115
Mutual Ins. Co. v. Brig George 221
v. Cargo 225
v. Easton R. R. Co. 84
Myers v. Brownell 57
v. Hazard 185
v. State 101
Myres v. Yaple 97

N.

Nailer v. Stanley 75, 77
Nally v. Long 141
Nanz v. Oakley 202
Nash v. Burchard 182
v. Taylor 243
Nassau Bank v. Campbell 182 *a*
National Bank v. Porter 182
National Exchange Bank v. Silliman 129
National Ins. Co. v. Crane 236
National Savings Bank v. Cresswell 77
Neal v. Nash 187
v. Patten 209
Nebergall v. Tyree 90
Neck, *ex parte* 192
Neel v. Carson 209
Neely v. Bee 141, 142
v. Jones 248
Neff v. Miller 86, 107, 110
Neff's Appeal 86, 115
Neidig v. Whiteford 20
Neilson v. Fry 137, 180
Neimcewicz v. Gahn 51, 86, 104, 114
Nellons v. Truax 77, 216
Nelson, *in re* 23
v. Boundbrook Ins. Co. 234
v. Dunn 61
v. Ferris 185
v. First National Bank 85
v. Harrington 113
v. Loder 14, 45
v. Munch 120
v. Rogers 85

Section
Nelson *v.* Williams 87, 119, 122, 186
Neptune Ins. Co. *v.* Dorsey 127
Netterville *v.* Barbor 248
New Bedford Savings Bank *v.* Hathaway 138, 140, 151
v. Union Mill 115
New Bedford Savings Institution *v.* Fairhaven Bank 162
New England Ins. Co. *v.* Dunham 228
v. Randall 126
New England Jewelry Co. *v.* Merriam 57
New Hampshire Savings Bank *v.* Colcord 86
New Haven Savings Bank *v.* McPartland 13
New Jersey Ins. Co. *v.* Meeker 57
New Jersey Midland R. R. Co. *v* Wortendyke 128, 248
New Jersey Sinking Fund *v.* Woodward 74
New London Bank *v.* Lee 155
New Orleans *v.* Baltimore 214
New Orleans Bank *v.* Eagle Cotton Co. 2
New Orleans Canal Co. *v.* Escoffie 115
New York Bank *v.* Fletcher 106, 137
New York Exchange Bank *v.* Jones 121
New York Ins. Co. *v.* Aikin 85
v. Roulet 224
v. Vanderbilt 46
Newbern *v.* Dawson 137
Newbold *v.* Newbold 68
v. Smart 173
Newburg Bank *v.* Smith 124
Newcomb *v.* Boston & Lowell R. R. Co. 189
v. Cincinnati Ins. Co. 232
v. Raynor 182 *a*
Newman *v.* Greenville Bank 115
v. Kirk 40
Newsam *v.* Finch 139
Newson *v.* McLendon 164, 180
Newton *v.* Chorlton 86, 87, 119
v. Cook 49, 52
v. Field 137
v. Newton 169
v. Sly 49
Niagara Ins. Co. *v.* Fidelity Ins. Co. 232
v. Scammon 235
Nichols *v.* Baxter 233
Nichols *v.* Burch 119
v. Dunn 243
v. Palmer 126
v. Wadsworth 10 *a*
Nightingale *v.* Chaffee 188
Niles *v.* Harmon 75
v. Nye 49
Nippert *v.* The J. B. Williams 243
Noble *v.* Murphy 113, 129
v. Turner 110
Noland *v.* Clark 121
Nolte *v.* Creditors 241
Nordyke & Harmon Co. *v.* Gery 233
Norris *v.* Morrison 50, 51
North Amer. Ins. Co. *v.* Handy 151
v. St. Louis Ry. Co. 221
North British Ins. Co. *v.* Felrath 236
North Carolina R. R. Co. *v.* Drew 167 *a*
North of England Insurance Association *v.* Armstrong 221, 222
North National Bank *v.* Hamlin 181, 182
North River Construction Co., *in re* 248
Northcraft *v.* Oliver 38
Northern Dispensary *v.* Merriam 26
Northrup *v.* Metcalf 75
Northwestern Co. *v.* Randolph 82
Norton *v.* Coons 150
v. Highleyman 241
v. Lewis 75
v. Lexington Ins. Co. 225
v. Phelps 206
v. Plumb 164
v. Reid 130
v. Soule 87
Norwich Ins. Co. *v.* Boomer 235
Norwood *v.* De Hart 85
Noyes *v.* Ray 46
Nugent *v.* Potter 5, 250
v. Priebatsch 39
Nunn *v.* Berger 3
Nurre *v.* Chittenden 188

O.

Oakeley *v.* Pasheseller 25, 171
Oakey *v.* Sheriff 5, 250
O'Bannon *v.* Miller 171
O'Blemis *v.* Karing 101
O'Brien *v.* Harrison 88

SECTION
O'Brien *v.* Joyce 19
v. Krenz 74
O'Bryan *v.* Neel 180
O'Conner *v.* O'Conner 85
O'Hara *v.* Baum 188
v. Haas 191
v. Schwab 91
Ohio Ins. Co. *v.* Ledyard 176
v. Reeder 188
v. Winn 1
Ohio Life Ins. Co. *v.* Winn 187
Ohmer *v.* Boyer 207 *a*
Okie *v.* Spencer 182 *a*
Old *v.* Chambliss 118
Old Dominion Bank *v.* Allen 201
Olds *v.* Cummings 185
Oliver *v.* Bragg 186
v. Montgomery 172
v. Moore 82
Oliver, The Edward 61
Olson *v.* Morrison 171
Olympic Theatre, The 62
O'Neal *v.* Deese 10
Oneida Bank *v.* Ontario Bank 188
O'Neil *v.* Seixas 185
Onge *v.* Truelock 140
Ontario Bank *v.* Walker 137, 201
Opp *v.* Ward 182
Oregon Trust Co. *v.* Shaw 57
O'Reilly *v.* Holt 14
Orem *v.* Wrightson 88
Oriental Bank, *in re* 182
Ormsby *v.* Fortune 121
Orrick *v.* Durham 24
Orvis *v.* Newell 111
v. Powell 75
Osborn *v.* Bryce 101
v. Cunningham 113, 171
v. Noble 154, 155, 160
Osborne *v.* Cabell 85
v. Taylor 81
v. United States 121
Otis *v.* Gregory 248
v. Von Storch 120
Ottawa Bank *v.* Dudgeon 108, 129
Ottman *v.* Moak 86
Oury *v.* Sanders 245, 247
Overend, *in re* 184
v. Oriental Financial Corporation 25
Owen, Appeal of 112
v. Cook 248
v. Delamere 206

SECTION
Owen *v.* McGehee 142, 151, 169
Owens *v.* Bedell 248
v. Johnson 19
v. Miller 154
Owings *v.* Owings 105

P.

Pacific Bank *v.* Mitchell 181, 186
Paducah Lumber Co. *v.* Paducah Water Supply Co. 85
Page *v.* Burnstine 239
v. Foster 12
v. Pierce 185
Paine *v.* Bonney 172
v. Jones 24
v. Waite 20
Palen *v.* Shurtleff 188
Pallen *v.* Agricultural Bank 75, 77
Palmer *v.* Fowley 57
v. Stacy 169
Palmeter *v.* Carey 85
Pancoast *v.* Duval 75
Pardee *v.* Lindley 185
v. Treat 85
v. Van Anken 45
Parham *v.* Cobb 118
v. Green 140
Paris *v.* Hulett 155
Paris, The City of 221
Parke *v.* Hush 3
Parker *v.* Alexander 120
v. Dennie 69
v. Goddard 81
v. Mercer 118
v. Sanborn 181
Parkman *v.* Welch 78
Parks *v.* Watson 246
Parry *v.* Wright 47
Parsons *v.* Clark 156
Partridge *v.* Partridge 185
Patterson, Estate of 39
v. Birdsall 42
v. Booth 185
v. Brock 122
v. Gibson 101
v. Mills 57
v. Pope 111, 181
v. Triumph Ins. Co. 236
Pattison *v.* Hull 185
Patton *v.* Adkins 26
Patty *v.* Pease 79, 81

SECTION
Paul *v.* Berry 141
Paulin *v.* Kaighn 143, 148
Paulsen *v.* Manske 28
Paxton *v.* Harrier 75, 78
v. Sterne 88
Payne *v.* Atterbury 98
v. Avery 75
v. Burnham 114
v. Commercial Bank 120, 126
v. Hathaway 19, 36 *a*, 245
v. Wilson 84
Peacock *v.* Williams 85
Pearce *v.* Morris 16
Pearl *v.* Deacon 8
v. Clark 192
v. Hervey 247
Pearl St. Society *v.* Imlay 87, 119, 123
Pearman *v.* Gould 236
Pearse *v.* Quebec Stmp. Co. 229
Pearson *v.* Carr 79
Pease *v.* Egan 86 *a*, 179, 245
v. Jackson 20
v. Tilt 182 *a*
Peck *v.* Glass 207 *a*
Peckham *v.* Hadwen 50
Peeples *v.* Horton 213
Peet *v.* Beers 28
Peets *v.* Wilson 188
Peirce *v.* Ocean Ins. Co. 225
Peltz *v.* Clarke 12, 13
Pence *v.* Armstrong 86
Pendergrass *v.* Pendergrass 202
Pendleton *v.* Elliott 234
Pennock *v.* Hoover 63
Pennsylvania Bank *v.* Potius 91, 127
Pennsylvania R. R. Co. *v.* Pemberton R. R. Co. 87
Pentz *v.* Ætna Ins. Co. 232
People *v.* Brandreth 101
v. Buster 151
v. Onondaga 7
v. Skidmore 168
People's Bank *v.* Ballowe 46
People's Gas Co. *v.* Fidelity Title Co. 238
People's Ins. Co. *v.* Strachle 232
Peoria Ins. Co. *v.* Frost 6, 230
Perew, The Mary E. 221
Perfect, *ex parte* 190
Perkins *v.* Hall 42
v. Kershaw 187
v. Nolan 86
Perrin *v.* Kellogg 17

SECTION
Perrine *v.* Mobile Ins. Co. 86, 92, 123
Perrott *v.* Shearer 232
Perry *v.* Miller 108, 129
v. Williams 39
Perseverance Iron Works *v.* Ollier 195
Person *v.* Perry 95
Persons *v.* Shaeffer 17
Peter *v.* Beverly 202
v. Smith 15
Peters *v.* Bourne 248
v. Clements 34
v. Florence 19
v. McWilliams 187
Petersburg Savgs. Co. *v.* Lumsden 92
Peterson *v.* Willing 188
Petitt *v.* First Nat'l Bank 189
Pettee *v.* Peppard 85
Pettengill *v.* Pettengill 179
Pettibone *v.* Steven 61
Pettillo, *in re* 97, 180 *a*
Pettit *v.* Black 84
Pettus *v.* McKinney 243
Petty *v.* Cook 123
Phares *v.* Barbour 120
Phelan *v.* Olney 185
Phelps *v.* Comber 195
v. McNeely 171 *a*
v. Pope 18
Phila. & Reading R. R. Co. *v.* Little 180 *a*
Philbrick *v.* Shaw 90
Philbrooks *v.* McEwen 86, 119, 121
Phillips *v.* Blatchford 171
v. Chamberlain 40
v. Lewistown Bank 185
v. Merrimack Ins. Co. 236
v. St. Louis Ins. Co. 225
v. Thompson 159
Phillipsburg Building Association *v.* Hawk 65
Philpot *v.* Briant 126
Phinney's Estate 211
Phipps *v.* Phipps 215
Phœnix Ins. Co. *v.* Chadbourne 235
v. Erie Transportation Co. 229
v. First National Bank 237
v. Floyd 237
v. Holloway 123
v. Liverpool Stmp. Co. 229

SECTION
Pulliam *v.* Adamson 85
Pulsifer, *in re* 182
v. Waterman 102
Purdy *v.* Doyle 186
Purviance *v.* Sutherland 130
Purvis *v.* Castaphan 104
Putnam *v.* Collamore 47
v. Schuyler 101
v. Tash 106, 113
Pyncheon *v.* Lester 52

Q.

Quackenbush *v.* O'Hare 70, 88
Quarrier *v.* Quarrier 188
Quebec Ass. Co. *v.* St. Louis 232
Queen *v.* O'Callaghan 88
Quinn *v.* Wallace 137

R.

Raber *v.* Gund 64
Rackley *v.* Scott 238
Radcliffe, *in re* 54
Raddy *v.* Whitney 122
Raffety *v.* King 45
Railroad Co. *v.* Soutter 44
Railroad Cos. *v.* Schutte 167 *a*
Railway Co. *v.* Fire Association 230
v. Manchester Mills 229
Rainbow *v.* Juggins 120
Rainsburg Borough *v.* Fyan 19
Ramsey *v.* Lewis 148
v. Westmoreland Bank 120, 122
Ramsey's Appeal 61
Rand *v.* Barrett 20
Randall *v.* Bradley 26
v. Cockran 221
v. Moon 181
v. Sweet 243
Randolph *v.* Randolph 110
Ranken *v.* Alfaro 198
Rankin *v.* Coare 4
v. Wiley 160
v. Wilsey 157
Ranney *v.* McMullen 85
Rapp *v.* Stoner 26
Raum *v.* Kaltwasser 85
Raun *v.* Reynolds 75
Rawiszer *v.* Hamilton 58
Rawlings *v.* Barham 126
Rawson *v.* Taylor 171

SECTION
Ray *v.* Detchon 31, 38
v. Proffett 154
v. Smith 188
Raymond *v.* Holborn 81
v. Raymond 34
Rayner *v.* Preston 228
Raynor *v.* Raynor 77
Reardin *v.* Walpole 178
Red Bank Building Association *v.* Patterson 65
Redelsheimer *v.* Miller 85
Redington *v.* Cornwell 1, 245
Redman *v.* Turner 123
Redmond *v.* Burroughs 211
Reed *v.* Lukens 235
v. Norris 105
v. Paul 24
v. Pruyn 7
Rees *v.* Eames 7
Reese *v.* Bradford 171
Reeve *v.* Reeve 218, 219
Reeves *v.* Pulliam 110
Regina *v.* Salter 88
Reid *v.* McCrum 233
v. Sycks 47
Reigle *v.* Leiter 63
Reilly *v.* Mayer 1, 65
Reinhart *v.* Johnson 141
Reinstein *v.* Smith 206
Reitz *v.* People 103
Relfe *v.* Bibb 77
Renick *v.* Ludington 82, 120
Resor *v.* McKenzie 25
Reyburn *v.* Mitchell 12
Reynard *v.* Arnold 238
Reynolds, *in re* 102
v. Dechaums 121
v. Tooker 61
Rhame *v.* Lewis 89
Rhea *v.* Greer 202
v. Preston 7
Rhead *v.* Hounson 40
Rheeling's Appeal 246
Rhoads's Estate 213
Rhode *v.* Crockett 187
Ricard *v.* Sanderson 85
Rice *v.* Barnard 171 *a*
v. Cobb 228
v. Dewey 187
v. Downing 127
v. Harbeson 204, 207
v. Hearn 137
v. Morris 127

Section
Rice v. Morton 151
  v. Rice 187
  v. Savory 171 *a*
  v. Southgate 87
  v. Truesdell 150
Rice's Appeal 154
Richards v. Commonwealth 122, 123
  v. Griffith 17
  v. Yoder 155
Richardson, *ex parte* 206
Richardson, *in re* 190
  v. City Bank 182
  v. Hall 211, 213
  v. Hockenhull 57
  v. Home Ins. Co. 235
  v. Skolfield 51
  v. Tobey 171 *a*
  v. Traver 41
  v. Wallis 64
  v. Washington Bank 129
Richelieu Navigation Co. v. Thames Ins. Co. 236
Richeson v. Crawford 88
Richey v. Merritt 81
Richmond v. Marston 39
Richter v. Cummings 187
Rickman v. Miller 85
Riddle v. Coburn 97
Riemer v. Schlitz 131
Riffle's Appeal 243
Rigney v. Lovejoy 28
Riley v. Schawacker 183
Rindge v. Coleraine 245
  v. Sanford 195
Rinehart v. Long 88
Ringo v. Wing 85
Rintoul v. N. Y. Central R. R. Co. 229
Ripley v. Astor Ins. Co. 236
Risk v. Hoffman 24
Ritchie v. McDuffie 26
Ritenour v. Matthews 130
Rittenhouse v. Levering 87, 106, 110
Ritter v. Cost 4
  v. Phillips 82
Roach v. Hacker 48
Robb v. Mudge 171 *a*
Robb's Appeal 203
Robenson v. Urquhart 35
Roberson v. Towne 119
Roberts v. Austin 200 *a*
  v. Bruce 137
  v. Colvin 154
  v. Hughes 22

Section
Roberts v. Jeffries 114
  v. Lane 183
  v. Sayer 148
  v. The Huntsville 105
  v. Traders' Ins. Co. 234, 235
Robertson v. Baker 164
  v. Deatherage 150
  v. Mowell 19, 110
  v. Triggs 88
Robertson, The 105
Robeson v. Roberts 122
Robeson's Appeal 64
Robey v. Ollier 195
Robins v. Swain 22
Robinson v. Brooks 141
  v. Chairman 208
  v. Leavitt 11, 13, 45, 215
  v. Memphis & Charleston R. R. Co. 189 *a*
  v. Reynolds 183
  v. Robinson 205
  v. Sampson 20
  v. Sherman 81, 105
  v. Trevor 20
Rockingham Bank v. Claggett 187
Rockingham Ins. Co. v. Bosher 232
Roddy's Appeal 177
Rodenbarger v. Bramblett 100
Rodgers v. McCluer 77, 134, 187
Rodman v. Sanders 247
Roe v. Roe 218
Rogers v. Benton 81
  v. Blum 63
  v. Herron 57
  v. Holyoke 68
  v. Hosack 221
  v. James 185
  v. Jones 219
  v. Meyers 22, 64
  v. Nuttall 7
  v. Omaha Hotel Co. 84
  v. Rogers 207, 211
  v. School Trustees 86, 111
Rolfe v. Flower 171
Rollins v. Henry 39
Rooker v. Benson 86, 128
Root v. Stow 117
Rosborough v. McAliley 117
Rose v. Schaffner 206
Rosenbaum v. Goodman 134
Ross v. Duggan 62, 78
  v. Haines 82
  v. Jones 201

SECTION
Ross *v.* Saulsbury 193
v. Wilson 155, 156
v. Woodville 101
Rossiter *v.* Cossit 51
Roth *v.* Harkson 1, 3, 241
Roundtree *v.* Weaver 7
Rourke *v.* Colton 26
Rousseau's Succession 75
Rowe *v.* Williams 91
Rowley *v.* Bigelow 189 *a*
v. Towsley 44
Roy *v.* Clarke 247
Royal Bank, *ex parte* 182, 182 *a*
v. Commercial Bank 190, 194
Royalton Bank *v.* Cushing 171
Rubens *v.* Prindle 25
Ruble *v.* Norman 87, 119
Rucker *v.* Donovan 12
Rucks *v.* Taylor 110
Ruddell *v.* Childress 130
Ruggles *v.* Barton 26, 34
Rumpp *v.* Gerkens 58
Rupe *v.* Hadley 40
Rush *v.* State 36
Rushforth, *ex parte* 127, 130
Russell, *in re* 115
v. Austin 18
v. Hester 121
v. Houston 77
v. Howard 12, 61
v. Hudson 31
v. La Roque 158
v. Pistor 47
v. Southard 235
v. Weinberg 120
Rushworth *v.* Moore 181
Rust *v.* Chisolm 61
Rutherford *v.* Branch Bank 151
Rutland *v.* Pippin 7
Ryan *v.* Adamson 233
v. Morton 126
Ryer *v.* Gass 28
Ryswick, *ex parte* 182

S.

Saffold *v.* Wade 154
Sager *v.* Tupper 65
Saint *v.* Ledyard 90
Saint Albans Bank *v.* Wood 120
Saint Albans Trust Co. *v.* Farrar 20
Saint Francis Mill Co. *v.* Sugg 240

SECTION
Saint Joseph Mfg. Co. *v.* Daggett 66 *a*, 75
Saint Joseph's Ins. Co. *v.* Hauck 126
Saint Lawrence, The 243
Saint Louis *v.* Priest 81
Saint Louis Building Association *v.* Clark 198
Saint Louis Coal Mining Co. *v.* Sandoval Coal Co. 30, 246
Saint Louis R. R. Co. *v.* Commercial Ins. Co. 282
v. Larned 189 *a*
v. McCaughey 248
Saint Paul Ins. Co. *v.* Johnson 236
Saint Peters Literary Association *v.* Webb 000
Salaun *v.* Relf 199
Salem *v.* Edgerley 74
Salem Bank *v.* Salem Mills 185
Salem, The City of 243
Salina Bank *v.* Abbott 201
Saline County *v.* Buie 86
Salkeld *v.* Abbott 140
Salter *v.* Creditors 202
Salyers *v.* Ross 150
Sample *v.* Cochran 120
Samuel *v.* Zackeray 110
Sanborn *v.* Magee 59
Sanders *v.* Clason 171 *a*
v. Sanders 36 *a*
v. Watson 137
v. Weelburg 142
Sandford *v.* Hill 79
Sandidge *v.* Graves 66 *a*
Sandoe's Appeal 219
Sands Ale Brewing Co., *in re* 233
Sanford *v.* Buckley 27
v. McLean 3, 240
v. Van Arsdall 82
Sangster *v.* Cochran 20
Santa Marina *v.* Connolly 79
Sarah Ann, The 225
Sarah J. Weed, The 34
Sargeant *v.* Fuller 49
Sargent *v.* Howe 185
v. Salmon 102
Sarles *v.* McGee 81
v. Sarles 218
Sasscer *v.* Young 87
Saulet *v.* Trepagnier 120
Saunders *v.* Cook 69
v. Frost 27
v. Saunders 36 *a*
v. Watson 137

SECTION
Saunders, the B. B. 229
Santhoff, *in re* 68
Savage *v.* Hall 49
  v. McCorkle 220
  v. Putnam 171
  v. Winchester 104
Savings Bank *v.* Cresswell 75
Sawyer *v.* Lyon 173, 179
Sawyers *v.* Baker 116
Sayles *v.* Sims 143
Saylors *v.* Saylors 154
Sayre *v.* McEwen 115
Scanland *v.* Settle 119
Schaefer *v.* Causey 209
Schaeffer *v.* Bond 116
Schaller, *in re* 48
Scheppleman *v.* Fuerth 26
Scherer *v.* Schutz 137
Schissel *v.* Dickson 14
Schlatre *v.* Greaud 85
Schleissman *v.* Kallenberg 137
Schlussner *v.* Kallenberg 137
Schmidt *v.* Coulter 148
  v. United Ins. Co. 225
Schmidtapp *v.* Currie 171, 171 *a*, 172
Schmucker *v.* Seibert 85
Schnitzel's Appeal 131
Schoenewald *v.* Dieden 169
Schofield *v.* Bayard 184
  v. Cox 75, 78
School Trustees *v.* Anderson 85
Schoolfield *v.* Rudd 137
Schooner Freeman *v.* Buckingham 189 *a*
Schoonover *v.* Allen 89
Schroeder *v.* Central Bank 200 *a*
Schroeppel *v.* Shaw 120
Schryver *v.* Fuller 75
Schultz *v.* Carter 86, 137
Schur *v.* Schwartz 86, 131
Scotland Bank *v.* Dominion Bank 10 *a*
Scotland County *v.* Hill 183
Scott *v.* Dunn 86 *a*
  v. Featherston 85, 86
  v. Henry 12
  v. Hillenburg 220
  v. Morrison 207
  v. Nichols 110
  v. Patchin 1
  v. Pound 185
  v. Scott 105
  v. Timberlake 102
  v. Turner 185

SECTION
Scott *v.* Webster 58
Scott's Appeal 171
Scottish Ins. Co. *v.* Turner 227
Screven *v.* Joyner 176
Scribner *v.* Adams 141
Scrivner *v.* Dietz 60
Sea Ins. Co. *v.* Hadden 227
Seacord *v.* Miller 188
Searing *v.* Berry 137
Searles *v.* Jacksonville R. R. Co. 18, 66 *a*
Sears *v.* Laforce 86
  v. Wingate 189 *a*
Sedan *v.* Williams 171 *a*
Seibert *v.* Thompson 155
  v. True 154
Seighman *v.* Marshall 59
Seixas *v.* Gonsonlin 181
Selb *v.* Montague 49
Selby *v.* Selby 204
Selfridge *v.* Gill 191
Seligman *v.* Wells 190
Selleck *v.* Phelps 40
Sellers *v.* Jones 121
Sells *v.* Hubbell 171
Semans *v.* Harvey 22
Semmes *v.* Boykin 172
  v. Naylor 131, 184
Sergeant *v.* Rowsey 74
Serviss *v.* McDonald 171 *a*
Sessions *v.* Kent 15
  v. Pintard 117
Sewall *v.* Howard 5
Seward *v.* Huntington 165, 169
Sewell *v.* Howard 250
Sexton *v.* Pickett 80
Seymour *v.* Mackay 20
Shackell *v.* Colnett 54
Shackleford *v.* Stockton 116, 165
Shaeffer *v.* Clendennin 141
Shall *v.* Biscoe 185
Shamburg *v.* Abbott 171
Shamp *v.* Meyer 85
Shannon *v.* Hay 31
Sharkey *v.* Bankston 209
Sharon *v.* Sharon 101
Sharp *v.* Barker 14
  v. Caldwell 110
  v. Collins 46
  v. Fagan 122
  v. Shea 81
Shattuck *v.* Cox 87
  v. Lawson 171

SECTION

- Shaver *v.* Shoemaker 34
- Shaw *v.* Foster 34
  - *v.* Grant 246, 250
  - *v.* Holmes 7
  - *v.* Thompson 205
- Shaw, the John K. 189 *a*
- Shawano Bank *v.* Koeppen 40
- Sheddy *v.* Geran 46
- Sheehan *v.* Taft 145
- Sheen *v.* Hogan 36 *a*
- Sheffield Banking Co. *v.* Clayton 160
- Sheffy's Appeal 26
- Sheidle *v.* Weishlee 104
- Shelby *v.* Marshall 86
- Sheldon *v.* Edwards 57
  - *v.* Hoffnagle 49
  - *v.* Welles 142
- Shell *v.* Young 64
- Shepherd *v.* Brown 78
  - *v.* Burkhalter 81
  - *v.* May 25
  - *v.* McClain 56
  - *v.* McIntyre 88
- Sherlock *v.* Alling 239
- Sherman *v.* Shaver 7
- Sherradeen *v.* Parker 119, 120
- Sherwood *v.* Collier 187
- Shields *v.* Kimbrough 73
  - *v.* Whittaker 89
- Shimer *v.* Hammond 54
- Shinn *v.* Budd 1, 2, 3, 240, 241
  - *v.* Fredericks 24
  - *v.* Shinn 170
  - *v.* Smith 65, 114
- Shipley *v.* Fox 112
- Shippen, Appeal of 104
  - *v.* Clapp 121
- Shirley *v.* Shirley 98
- Shock *v.* Miller 151
- Shoffner *v.* Fogleman 97
- Short *v.* Currier 20, 55
  - *v.* Porter 209
  - *v.* Sears 88
- Shrack *v.* Shiner 78
- Shreve *v.* Hankinson 248
- Shrewsbury *v.* Shrewsbury 13
- Shriver *v.* Lovejoy 122
- Shropshire *v.* Creditors 169, 179
- Shults *v.* Fingar 122
- Shutes *v.* Woodard 14
- Sibley *v.* Baker 75, 84
  - *v.* Parker 75
- Sickles *v.* Flanagan 84

SECTION

- Sidener *v.* Hawes 1, 35
  - *v.* Pavey 20
- Sidenor *v.* Havens 1
- Sieger *v.* Second National Bank 182 *a*
- Sigler *v.* Knox County Bank 171
- Silk *v.* Eyre 3, 179
- Silver Lake Bank *v.* North 2, 12, 13, 245
- Silvey *v.* Dowell 143
- Simmons *v.* Camp 143
  - *v.* Cates 108, 129
  - *v.* Goodrich 159
  - *v.* Lyle 48
  - *v.* Tongue 121
  - *v.* Walker 241
- Simmons Hardware Co. *v.* Brokaw 63
- Simonds *v.* Union Ins. Co. 221
- Simonton *v.* Gray 49
- Simpson *v.* Del Hoyo 85
  - *v.* Eggington 186
  - *v.* Gardiner 178
  - *v.* Hall 57
  - *v.* McPhail 110
  - *v.* Pease 57
  - *v.* Thomson 6, 223
- Sims *v.* Lester 17
- Simson *v.* Brown 155, 167
- Sinclair *v.* Redington 151
- Singizer's Appeal 171
- Sioux City R. Co. *v.* Fremont Bank 189 *a*
- Skeel *v.* Spraker 74, 75, 84
- Skiff *v.* Cross 90
- Skillman *v.* Teeple 156
- Skinner *v.* Terhune 86, 130 *a*
- Skyrme *v.* Occidental Mill Co. 34
- Slack *v.* Kirk 245
- Slade *v.* Mutrie 188
  - *v.* Van Vechten 61, 62
- Slater *v.* Breese 63
- Sledge *v.* Obenchain 20
- Slevin *v.* Morrow 121
- Sloan *v.* Sewell 81
- Slocum *v.* Catlin 80
- Small *v.* Stagg 19
- Smart, *ex parte* 190
- Smith, Appeal of 182 *a*
- Smith, *in re* 171, 193, 197
  - *v.* Alexander 245
  - *v.* Anderson 183
  - *v.* Arden 114
  - *v.* Ayer 206
  - *v.* Bing 131
  - *v.* Blake 244

Section
Smith *v.* Brittain 84
v. Brunk 185
v. Bynum 20
v. Clopton 126
v. Conrad 141
v. Coran 1
v. Cornell 26
v. Dinsmoor 42
v. Foran 1, 244
v. Gillam 162
v. Green 16
v. Harrison 1, 137
v. Herbin 110
v. Hitchcock 84
v. Hoskins 202
v. Hurd 244
v. Jordan 31
v. Latimer 169
v. Lewis 46
v. McKean 121
v. McLeod 86, 119
v. Miller 7
v. Morrill 188
v. Ostermeyer 25
v. Pettigrew 202
v. Provin 12
v. Roberts 14, 54
v. Robertson 81
v. Rumsey 137, 140
v. Schneider 87, 97
v. Shelden 171
v. Smith 188
v. State 151
v. Swain 137
v. Swan 57
v. Thompson 110
v. Townsend 104
v. United States 151
v. Wait 64
v. Wilson 250
v. Wyckoff 208
Smokey *v.* Peters-Calhoun Co. 101
Snelling *v.* McIntyre 8
Snow *v.* Callum 218
v. Stevens 18, 52
Snowdon, *ex parte* 151
Snyder *v.* Crawford 81
v. Snyder 49, 51
Sohier *v.* Loring 120, 182
Somersworth Savings Bank *v.* Worcester 122
Somerville *v.* Marbury 122
Sonoma Bank *v.* Gove 183

Section
Sorrells *v.* Trantham 202
Sotheren *v.* Reed 187
Soulié *v.* Brown 3, 5
South *v.* Bloxam 117
South Carolina Bank *v.* Adger 137
South Scituate *v.* Hanover 241
Southall *v.* Farish 105
Southard *v.* Dorrington 12
Souther, *in re* 182
Southern Michigan Bank *v.* Byles 68 *a*, 182
Southworth *v.* Schofield 12, 22
Spalding *v.* Bank of Susquehanna 123
Spangler *v.* Sheffer 122
Sparhawk *v.* Bagg 46
v. Buell 202
Spaulding *v.* Crane 28, 128
v. Harvey 86 *a*
Spear *v.* Ward 104
Speer *v.* Whitefield 26
Speight *v.* Porter 115
Speiglemeyer *v.* Crawford 45
Spencer *v.* Ayrault 57
v. Harford 59
Spiller *v.* Creditors 2, 188
Splidt *v.* Bowles 227
Spong *v.* Spong 218
Spott *v.* Commonwealth 89
Spoule *v.* Samuel 190
Sprague *v.* Graham 185
Spratt *v.* Pierson 19, 44
Spray *v.* Rodman 3
Spring *v.* Chipman 97
v. George 122
Springer *v.* Dwyer 101
v. Springer 1, 137, 151
v. Toothaker 86, 119, 122
Springfield Ins. Co. *v.* Allen 237
Springs *v.* Harven 209
Sproul *v.* Prior 208
Spurgin *v.* Adamson 53
Squier *v.* Shepherd 37
Stackpole *v.* Robins 31
Stackville Bank *v.* Meyer 189
Stafford *v.* Ballou 20
v. Montgomery 180 *a*
v. New Bedford Savings Bank 116
v. Yates 183
Stallings *v.* Americus Bank 86
Stamford Bank *v.* Benedict 117, 127
Stancliift *v.* Norton 14
Stanford *v.* Connery 105

SECTION
Stanley *v.* Nutter 187, 180
Stanton *v.* Quinan 34
  v. Thompson 57
Stanwood *v.* Clampitt 149
Staples *v.* Fox 6, 7, 12
Starr *v.* Ellis 13, 55
State *v.* Ætna Ins. Co. 68 *a*
  v. Atherton 151
  v. Atkins 89, 127
  v. Beal 43
  v. Berning 141
  v. Blakemore 110
  v. Brown 12
  v. Cordon 101
  v. Farrar 134
  v. Hemingway 102
  v. Hoshaw 84
  v. Matson 151
  v. McAleer 203
  v. Miller 91
  v. Ripley 84
  v. Titus 75
  v. Van Pelt 151
State Bank *v.* Davis 88
  v. Edwards 122
  v. Harlin 64
  v. Wilson 201
State Ins. Co., *in re* 68
  v. Maackens 236
Stayner *v.* Bower 202
Steamboat Virginia *v.* Kraft 10
Steamboat White *v.* Levy 246
Stearns *v* Godfrey 8, 20
  v. Quincy Ins. Co. 233
Stebbins *v.* Hall 26
  v. Willard 247
Steel *v.* Dixon 141, 151
Steele, *in re* 23
  v. Brown 144
  v. Mealing 141
Steere *v.* Childs 75
Steiner *v.* Erie Savings Co. 124
Stenhouse *v.* Davis 97
Stephens *v.* Casbacker 85
  v. Monongahela Bank 122
Stephenson *v.* Taveners 180
Sterling *v.* Brightbill 69
  v. Stewart 169, 180
Sternberg *v.* Valentine 61
Sternberger *v.* Hanna 75
Sterne *v.* Vincennes Bank 122
Stetson *v.* Moulton 89, 202
Stevens *v.* Church 26, 29

SECTION
Stevens *v.* Cooper 74, 78
  v. Goodenough 1, 82, 170
  v. Hannan 201
  v. King 1, 35, 39, 247
  v. Louisville R. R. Co. 167 *a*
  v. Mid-Hants Railway Co. 19
Stevenson *v.* Austin 191
Stewart *v.* Davis 86
  v. Fellows 36 *a*
  v. Greenock Ins. Co. 225, 227
  v. Lewis 101
  v. McMahan 78
  v. Robinson 206
Stickney *v.* Mohler 182 *a*
Stiewell *v.* Burdell 1, 5, 86
Stiger *v.* Bent 1, 14
  v. Mahone 46
Stiles *v.* Eastman 201
Stillman *v.* Stillman 24, 25
Stillwell *v.* How 188
Stimpson *v.* Pease 58
Stinchfield *v.* Milliken 235
Stinnett *v.* Crookshank 133
Stinson *v.* Anderson 48
  v. Richardson 47
Stirewalt *v.* Martin 116
Stirling *v.* Forrester 151
Stockard *v.* Granberry 122
Stokes, *ex parte* 140
  v. Lewis 242
Stoller *v.* Coates 10 *a*
Stone *v.* Darnell 38
  v. Seymour 129
Stoppelbein *v.* Shulte 51
Storch *v.* McCain 185
Storms *v.* Storms 87
  v. Thorn 122
Storrs *v.* Engel 115
Stott's Estate 202
Stout *v.* Dilts 7
  v. Fenno 181
Stover *v.* Wood 20
Straight *v.* Harris 81
Strange *v.* Fooks 120
Straton Commonwealth 91
Street *v.* Beal 14, 74, 83
  v. Old Town Bank 123
Strever *v.* Earl 54
Strickland *v.* Simons 206
Strong *v.* Blanchard 87
  v. Burdick 57
  v. Converse 52
Strother *v.* Hamburg 34

Section
Teutonia Bank *v.* Wagner 151
Texas & St. Louis R. R. Co. *v.* McCaughey 248
Thalheimer *v.* Crow 101
Tharp, *in re* 239
Thayer *v.* Daniels 63, 110
v. Finnegan 126
Theatre, the Olympic 62
Thebaud *v.* Hollister 57
Thirlwell *v.* Campbell 214
Thomas, *in re* 171
v. Bridges 11
v. Cleveland 119
v. Hammer 7
v. Montauk Ins. Co. 234
v. Moravia Foundry Co. 75
v. Richmond 183
v. Stewart 110
v. Vonkapff 233
Thomason *v.* Wade 187
Thompson *v.* Adams 148
v. Andrews 206
v. Bertram 85
v. Boyd 49
v. Chandler 13, 57
v. Heywood 31, 46
v. Hudson 249
v. Humphrey 89
v. Kenyon 34
v. Lack 151
v. Palmer 137
v. Robinson 122
v. Rowcroft 228
v. Taylor 130, 162, 181
v. Thompson 85
v. White 157
v. Simpson 197
Thomson *v.* Smith 206
Thorington *v.* Montgomery 77
Thornton *v.* Enterprise Ins. Co. 237
v. Exchange Bank 168
v. McKewan 87
Thorp *v.* Keokuk Coal Co. 85
Thrall *v.* Spencer 157, 160
Thyatira, The 221, 228
Tibbetts *v.* Langley Manufg. Co. 49
Tice *v.* Annin 22
v. Derby 172
Tichenor *v.* Dodd 26
Tichout *v.* Harmon 22
Tiedeman *v.* Knox 189
Tiernan *v.* Roland 219
v. Woodruff 126

Section
Tiffany *v.* Kent 21
Tilford *v.* James 167, 162
Tillotson *v.* Boyd 28
Timberlake *v.* Parish 218
Tinsley *v.* Oliver 137
Titcomb *v.* McAllister 148
Tobey *v.* Ellis 120
Tolman *v.* Smith 19
Tom *v.* Goodrich 113
Tomlinson *v.* Bury 218
Tompkins *v.* Fifth National Bank 180
v. Halstead 46
v. Little Rock R. R. Co. 167 *a*
v. Mitchell 169
v. Seeley 34, 36 *a*
v. Sprout 40
Tongue *v.* Nutwell 238
Toomer *v.* Dickerson 121
Topp *v.* Branch Bank 201
Toronto Bank *v.* Hunter 199
Torp *v.* Gulseth 87
Torregano *v.* Seguira 96
Torrey *v.* Cook 79
v. Orleans Bank 82
Toulmin *v.* Hamilton 190, 191
Towe *v.* Felton 187
v. Newbold 86, 130, 137
Tower *v.* Divine 57
Towle *v.* Hoit 14
Towne *v.* Ammidown 118, 202
Townsend *v.* Case Threshing Machine Co. 14
v. Ward 3, 26
v. Whitney 187
Townsend Savings Bank *v.* Munson 26
Tracy *v.* Lincoln 20
v. Pomeroy 131
Traders' Ins. Co. *v.* Propeller Manistee 221
v. Race 237, 241
Tradesmen's Building Association *v.* Thompson 248
Trapnall *v.* Richardson 63
Trask *v.* Hartford & N. H. R. R. Co. 230
Travellers Ins. Co. *v.* California Ins. Co. 85, 236
Tremont Nail Co., *ex parte* 197
Trent *v.* Calderwood 113
Trent Navigation Co. *v.* Hurley 120
Trentman *v.* Eldridge 130 *a*
Trenton Banking Co. *v.* Woodruff 20
Trible *v.* Nichols 42

Section

Trimble *v.* City Bank 199
v. Hunter 17
Trimmier *v.* Vise 59
Troost *v.* Davis 60
Trotter *v.* Crockett 121
v. Hughes 85
Troy *v.* Smith 154
True *v.* Congdon 87
Trusedell *v.* Callaway 240
Trustees *v.* Anderson 85
Tuck *v.* Calvert 86, 97
v. Hartford Ins. Co. 285
Tucker *v.* Crowley 59
v. Daley 100
Tunnard *v.* Hill 24, 85
Tunnell *v.* Jefferson 152
Turman *v.* Bell 31
Turnbull *v.* Thomas 41
Turner *v.* Faucett 204
v. Flinn 61, 66 *a*
v. McCarter 86
v. Quincy Ins. Co. 236
v. Shuffler 202
v. Teague 7
v. Wilkins 202
Tuskaloosa Bank *v.* Kennedy 40
Tuttle *v.* Brown 22
v. Howe 64
Twichell *v.* Mears 85
Two Rivers Mfg. Co. *v.* Boyer 88
Twombly *v.* Cassidy 14, 45
Tyler *v.* Busey 182 *a*
v. Ætna Ins. Co. 234
Tyrrell *v.* Ward 20
Tyrwhitt *v.* Tyrwhitt 54, 59
Tyus *v.* De Jarnette 147

U.

Ullman *v.* Barnard 189
Ulrich *v.* Drischell 31
Ulster Ins. Co. *v.* Leake 237
Ulster Savings Institution *v.* Leake 237
Underwood *v.* Met'n Bank 46
Unger *v.* Leiter 243
v. Smith 85
Union Bank *v.* Cooley 182 *a*, 191
v. Edwards 127, 129
v. Oceana Bank 200 *a*
Union College *v.* Wheeler 185
Union Ins. Co. *v.* Burrell 1, 221
v. Hanford 24, 85
v. Kirchoff 14

Section

Union Ins. Co. *v.* Slee 104, 185
Union Trust Co. *v.* Morrison 86
Uniontown Building Association's Appeal 81
United Ins. Co. *v.* Robinson 225
v. Scott 221
United States *v.* Duncan 63
v. Herron 88
v. Keehler 241
v. Preston 88, 138
v. Ryder 168
v. Sturges 154, 155
v. Vermilye 10
United States Bank *v.* Patten 136
v. Peters 41
v. Stewart 139, 154
v. Winston 132, 241
Upham *v.* Emerson 219
Urquhart *v.* Brayton 85
Uzzell *v.* Mack 97

V.

Vail *v.* Foster 155, 162
Valieri *v.* Boyland 189 *a*
Valle *v.* Fleming 30
Van Deusen *v.* Frink 59
Van Horne *v.* Everson 104
v. Fonda 172, 205
Van Mater *v.* Eley 63
Van Orden *v.* Durham 164
v. Johnson 78, 81
Van Slyke *v.* Van Loan 75
Van Vronker *v.* Eastman 51
Van Wagenen *v.* Brown 53
Van Winkle *v.* Williams 247
Vance *v.* Monroe 118
Vandegraaff *v.* Medlock 233
Vandercook *v.* Cohoes Savings Institution 45
Vandever *v.* Ware 137
Vannice *v.* Bergen 20, 57
Vanscoyoc *v.* Kimler 22
Varney *v.* Hawes 154
Vartie *v.* Underwood 104
Vason *v.* Beall 120
Vastine *v.* Dinan 101
Vattier *v.* Lytle 89
Vaughan *v* Halliday 193
Vaughn *v.* Clark 22
v Powell 64
Veach *v.* Wickersham 137
Ventress *v.* Creditors 12

Section
Vert *v.* Voss 127
Vilas *v.* McBride 82
Viles *v.* Moulton 26
Virgin's Succession 5, 250
Virginia, Commonwealth of, *v.* Chesapeake & Ohio Canal Co. 19, 127
Virginia Bank *v.* Boisseau 188
Virginia Steamboat *v.* Kraft 10
Voorhes *v.* Gros 80
Vose *v.* Handy 185
Voss *v.* German Bank 124
Vreeland *v.* Van Blarcom 85
Vrooman *v.* Turner 85

W.

Wackerbath, *ex parte* 184
Waddle *v.* Cureton 22
Wade *v.* Beldmeir 30
  v. Coope 87, 118
  v. Green 86
  v. Howard 13, 30, 36, 37
Wadsworth *v.* Blake 36 *a*
  v. Lyons 25
  v. Williams 47
Waggener *v.* Lyles 209
Waggoner *v.* Walrath 151
Wagner, Appeal of 20
  v. Elliott 4, 118
Wahrmund *v.* Merritt 247, 248
Waldo *v.* Richmond 20
Waldrip *v.* Black 105
Walker, *in re* 160
  v. Birch 195
  v. Bradbury 7
  v. Collins 115
  v. Covar 63
  v. Crowder 89
  v. Dement 185
  v. Dicks 102
  v. Doane 49
  v. Gilbert 101
  v. King 28
  v. Lawler 31
  v. Mackay 102
  v. Municipality no. One 179
  v. Stone 12, 47
  v. Vaudry 110
  v. Walker 49, 202
Wall *v.* Mason 9, 11, 43
Wallace *v.* Blair 57
  v. Conrad 23

Section
Wallace *v.* Greenlaw 146
  v. McBride 40
  v. Nichols 75
  v. Stevens 75
Wallace's Appeal 245
Waller *v.* Harris 137
  v. Oglesby 156
  v. Tate 34
Wallis *v.* Woodyear 68
Walsh *v.* Colquitt 123
  v. McBride 86
  v. Wilson 46
Walter *v.* James 186
Walters *v.* Defenbaugh 57
Waples *v.* Hays 31
Ward, Appeal of 87
  v. Hague 81
  v. New Zealand Bank 151
  v. Seymour 12
  v. Stahl 113
  v. Tyler 182
Ware, *ex parte* 86, 187
Waring, *ex parte* 190
  v. Loder 235
Warner *v.* Blakeman 17
  v. Chappel 186
  v. De Witt County Bank 78
  v. Morrison 150
Warren *v.* Cogswell 87
  v. Foreman 75
  v. Hayzlett 28
  v. Jennison 19
  v. Warren 21, 61
  v. Williams 19
Warren Bank *v.* Parker 201
Wartman *v.* Yost 101
Wartz *v.* Hart 61
Warwick *v.* Ely 65
Washburn *v.* Bank of Bellows Falls 171*a*
  v. Hammond 61, 68
Washington *v.* Tait 130
Washington Building Association *v.* Beaghen 72
Washington County *v.* Slaughter 20
Washington Ins. Co. *v.* Kelly 238
Washington, Ohio & Western R. Co. *v.* Cazenore 167 *a*
  v. Lewis 112
Wasson *v.* Hodshire 121
Water Power Co. *v.* Brown 103
Waterloo Bank *v.* Elmore 57
Waterman *v.* Clark 101
  v. Hunt 171, 171 *a*

SECTION
Waters *v.* Hubbard 25
Waterson *v.* Devoe 9
Watertown Ins. Co. *v.* Simmons 120
Watkins *v.* Eaton 172
  v. Winings 30
Watson *v.* Allcock 121
  v. Dickens 102
  v. Dundee Mortgage Co. 54
  v. Gardner 28
  v. Grand Rapids Co. 79
  v. Reed 119
  v. Rose 162
  v. Wilcox 19
Watson's Appeal 178
Watts *v.* Eufala Bank 110
  v. Kinney 86, 187
  v. Shuttleworth 120
  v. Symes 28, 42
  v. Watts 207 *a*
Weare *v.* Van Meter 172
Weaver *v.* Norwood 209
  v Toogood 22
  v. White 171 *a*
Webb *v.* Cole 241
  v. Hazleton 185
  v. Meloy 57
  v. Smith 68 *a*
  v. Webb 241
  v. Williams 30, 83
Weber *v.* Morris & Essex R. Co. 232
Webster's Appeal 8, 240
Wedge *v.* Moore 52
Weed, The Sarah J 84, 246
Weeks, *in re* 182
  v. Garvey 26
Weidner *v.* Thompson 20
Weihl *v.* Atlanta Furniture Co. 177
Weil *v.* Enterprise Ginnery Co. 186
Weimer *v.* Porter 9, 36 *a*
Weiss *v.* Guerineau 9, 11
Welby *v.* Welby 218
Welch *v.* Beers 82
  v. James 75, 77, 88
  v. Parran 118
Weld *v.* Sabin 12
Welling *v.* Ryerson 75
Wellington *v.* Small 244
Wells *v.* Lincoln County 31
  v. Mace 102
  v. Miller 150
  v. Oreg. Ry. & Nav. Co. 189
  v. Thomas 10
Wellsburg Bank *v.* Kimberlands 197

SECTION
Welton *v.* Hull 25
Wendell *v.* Highstone 121
Wenlock *v.* River Dee Co. 19
Wernecke *v.* Kenyon 97, 110
Wesley Church *v.* Moore 110
West, Appeal of 41, 185
  v. Belches 141
  v. Brison 130 *a*
  v. Creditors 88
  v. Rutland Bank 110
West Branch Bank *v.* Armstrong 181
West Michigan Bank *v.* Howard 189
Westchester Ins. Co. *v.* Foster 285
Western Transportation Co. *v.* Hoyt 10
Westfall *v.* Hintze 20, 49
Wetherell *v.* Joy 117
Wetzel *v.* Sponsler 130
Weyant *v.* Murphy 178
Whan *v.* Irwin 116
Wharton *v.* Duncan 120
Wheatley *v.* Calhoun 169
Wheaton *v.* Wheeler 126
Wheeler, Estate of 170
  v. Factor's Ins. Co. 233
  v Hawkins 89
  v. Watertown Ins. Co. 235
  v. Wheeler 202, 209
  v. Willard 22
Wheelwright *v.* De Peyster 81, 126
Whelan *v.* McCreary 205
Whipple *v.* Briggs 141
Whitcomb *v.* Whitmore 85
White *v.* Banks 147
  v. Brown 137, 235
  v. Butler 21
  v. Cannon 247
  v. Carlton 144
  v. Curd 247
  v. Dougherty 66
  v. Fulghum 64
  v. Hampton 12, 14
  v. Knapp 8, 20
  v. Life Assoc. of America 123
  v. Newhall 19
  v. Polleys 64
  v. Schurer 130
  v. State 7
  v. Sutherland 185
  v. Trotter 44
  v. Vann 10
  v. White 74
White (Steamboat) *v.* Levy 246

SECTION
Whitehead *v.* Gibbons 207
Whitehead's Succession 169
Whitehouse *v.* Edwards 110
Whiteman *v.* Harriman 141
Whithed *v.* Pillsbury 8, 24
Whiting *v.* Beebe 136
  v. Burke 183
Whitney *v.* Eliot Bank 197
  v. Salter 207 *a*
Whitridge *v.* Durkee 130
Whittacre *v.* Fuller 17
Whittaker *v.* Wright 9
Whitten *v.* Saunders 77
Whittier *v.* Heminway 7, 138
Whitting *v.* Gearty 85
Wickerman *v.* Robinson 98
Wickersham *v.* Reeves 57
Wiggin *v.* Dorr 167
Wiggins *v.* McDonald 171 *a*
Wigton *v.* Bowley 189
Wilbanks *v.* Wilbanks 218
Wilbur *v.* Williams 151
Wilcox *v.* Campbell 82
  v. Fairhaven Bank 127, 129
  v. Logan 247
  v. Todd 104
Wild *v.* Dean 171 *a*
Wilder *v.* Keeler 171
Wildes *v.* Chapman 171 *a*
Wildman, *ex parte* 182
Wiley, *in re* 171 *a*
  v. Boyd 44
  v. Ewing 12
  v. Knight 40
Wilhelmi *v.* Leonard 59
Wilkes *v.* Harper 210, 214
Wilkinson *v.* Babbit 4, 11, 44
  v. Dent 219
  v. Paddock 40
Willard *v.* Worsham 85
Willcox *v* Foster 20, 43
Willes *v.* Greenhill 100
William & Mary College *v.* Powell 85
Williams *v.* Aylesbury Railway Co. 4
  v. Boyd 171
  v. Brown 79
  v. Bush 171
  v. Germaine 184
  v. Hays 223
  v. James 181
  v. Matthews 183
  v. Owen 129
  v. Perry 174, 177

SECTION
Williams *v.* Stratton 209
  v. Thurlow 46
  v. Tipton 137
  v. Washington 70, 102
  v. Williams 127
Williamson *v.* Goodwyn 40
  v. Russell 46
Williamson's Appeal 206
Willis *v.* Caldwell 156
  v. Davis 120
  v. Jelineck 12
  v. Sharp 206
Willoughby *v.* Middlesex Co. 87
Willson *v.* Burton 46
  v. Phillips 85, 86
Wilson *v.* Barker 17
  v. Boden 34
  v. Brown 31, 247
  v. Bryant 25
  v. Burney 86, 187
  v. Dawson 128
  v. Doster 89
  v. Eads 122
  v. Fridenberg 206
  v. Hill 233
  v. Kimball 28
  v. King 85
  v. Mechanics' Bank 183
  v. Murray 44, 86
  v. Patton 64
  v. Raffalovitch 223
  v. Ridgely 137
  v. Senier 188
  v. Soper 171 *a*, 243
  v. Stilwell 171 *a*
  v. White 31
  v. Wright 201
Winans *v.* Wilkie 47
Winchester *v.* Beardin 131
Winder *v.* Diffenderffer 86, 241
Windett *v.* Union Ins. Co. 14
Windsor *v.* Evans 82
Winne *v.* Niagara Ins. Co. 236
Winslow *v.* Otis 89
Winston *v.* McAlpine 213
  v. Yeargin 86, 122
Wise *v.* Shepherd 61, 69
Witherington *v.* Mason 64
Wohner *v.* Handy 115
Wolbert *v.* Lucas 26
Wolcott *v.* Winchester 185
Wolf *v.* Ferguson 61, 62
  v. Lowry 31

SECTION
Wolf *v.* Smith 63, 78
Wolfe *v.* Banning 104
  v. Crawford 12
Wolff *v.* Walter 243, 247
Wolffe *v.* Nall 185
Wood *v.* Guarantee Trust Co. 248 *a*
  v. Hubbard 12
  v. Lake 87
  v. Morgan 121
  v. Moriarty 85
  v. Northwestern Ins. Co. 238
  v. Smith 24
  v. Wallace 49
  v. Wood 28
Woodbury *v.* Swan 24
Woodhull *v.* Reid 49
Woodland, The 246
Woodman *v.* Churchill 183
Woodruff *v.* State 101
Woods *v.* Gilson 241, 248
  v. Pittsburg Bank 108
  v. Ridley 248
  v. Wallace 49, 51
Woodward *v.* Davis 57
  v. Pell 181
  v. Severance 188
Woodworth *v.* Huntoon 188
Woolcocks *v.* Hart 63
Wooldridge *v.* Norris 86, 130
  v. Scott 19
Woollen *v.* Hillen 8, 20
Woolley *v.* Pemberton 202
Woolstencroft *v.* Woolstencroft 211
Wooster *v.* Cavender 20
Worcester, Estate of 64
Worcester Bank *v.* Cheeney 42, 58
Wormer *v.* Agricultural Society Works 19
Wornell *v.* Williams 121
Worner *v.* Waterloo Society 248
Worrall, *ex parte* 182
  v. Gray 65
  v. Hill 79
Wren *v.* Peel 180 *a*
Wright, *in re* 172, 213
  v. Atkinson 77
  v. Austin 180
  v. Briggs 24
  v. Crump 112
  v. Fitzgerald 7
  v. Garlinghouse 93

SECTION
Wright *v.* Grover & Baker S. M. Co. 137, 140
  v. Knepper 126
  v. Oroville Mining Co. 86 *a*, 245
  v. Patterson 47
  v. Walter 20
Wulff *v.* Jay 119, 121
Wyckoff *v.* Noyes 18
Wyldman, *ex parte* 182
Wyley *v.* Stanford 122
Wyman *v.* Hooper 84
Wynne, *in re* 20
  v. Willis 86
Wyoming, The 248

Y.

Yaple *v.* Stephens 19
Yates *v.* Joyce 244
  v. Mead 137, 182 *a*, 201
  v. White 6
  v. Whyte 222
Yeager's Appeal 133
Yelverton *v.* Shelden 139
Yglesias, *in re* 192, 194
Yoder *v.* Briggs 181
York *v.* Landis 86
York & Jersey Steamboat Co. *v.* Jersey Co. 61
York County Savings Bank *v.* Roberts 17
Young *v.* Hawkins 24
  v. Hill 58
  v. Miller 185
  v. Montgomery R. Co. 167 *a*
  v. Morgan 29
  v. School Trustees 85
  v. Sharer 20
  v. Shunk 150
  v. Twigg 209
  v. Vough 8, 86, 92
  v. Weldon 213
  v. Williams 12, 74, 84, 172

Z.

Zabriskie *v.* Salter 82
Zell's Appeal 247
Zook *v.* Clemmer 86
Zwickey *v.* Hainey 185
Zylstra *v.* Keith 81

the substitution of another person in the place of a creditor,[1] so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.[2] More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim.[3] The substitute is put in all respects in the place of the party to whose rights he is subrogated.[4] It has been adopted from the civil law by courts of equity.[5] In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed, and its doctrines more generally applied, than in England.[6] It is treated as the creature of equity,[7] and is so administered as to secure real and essential justice without regard to form,[8] independently of any contractual relations between the parties to be affected by it.[9] It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter;[10] but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable,[1] and it is not allowed where it would work any injustice to the rights of others.[2]

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[1] 2 Bouvier's Law Dic., *verb. cit.*

[2] King *v.* Dwight, 3 Rob. (La.) 2.

[3] Devens, J., in Jackson *v.* Boylston Ins. Co., 139 Mass. 508, 510; Gans *v.* Thieme, 93 N. Y. 225; Acer *v.* Hotchkiss, 97 N. Y. 395, 402; Sidener *v.* Hawes, 37 Ohio St. 532; Smith *v.* Foran, 43 Conn. 244; Stiger *v.* Bent, 111 Ills. 328; Braden *v.* Graves, 85 Ind. 92.

[4] Ohio Ins. Co. *v.* Winn, 4 Md. Ch. Dec. 253; Hodges *v.* Hightower, 68 Ga. 281.

[5] Shinn *v.* Budd, 14 N. J. Eq. 234; Springer *v.* Springer, 43 Penn. St. 518; Easterly *v.* Auburn Bank, 3 Thomp. & C. (N. Y.) 366; Furnold *v.* Missouri Bank, 44 Mo. 338.

[6] Enders *v.* Brune, 4 Rand. (Va.) 438, 447; Douglass *v.* Fagg, 8 Leigh (Va.), 588, 598; Furnold *v.* Missouri Bank, 44 Mo. 338.

[7] Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 235; s. c., 9 Cow. (N. Y.) 403; Scott *v.* Patchin, 54 Vt. 253; Mosier's Appeal, 56 Penn. St. 76; *Chapman, J.*, in Amory *v.* Lowell, 1 Allen (Mass.), 504; Meyer *v.* Mintonye, 106 Ills. 414; Terry *v.* Wooding, 2 Patton & H. (Va.) 178; Smith *v.* Harrison, 33 Ala. 706.

[8] Acer *v.* Hotchkiss, 97 N. Y. 395, 402; Hewitt, *in re*, 25 N. J. Eq. 210; Furnold *v.* Missouri Bank, 44 Mo. 338; Swan *v.* U. S. Bank, 2 Marshall, 293.

[9] Matthews *v.* Aikin, 1 N. Y. 595; Hoover *v.* Epler, 52 Penn. St. 522; Kyner *v.* Kyner, 6 Watts (Penn.), 221; Eaton *v.* Hasty, 6 Nebraska, 419.

[10] Harnsberger *v.* Yancey, 33 Gratt. (Va.) 527; Miller *v.* Winchell, 70 N. Y. 437; Stevens *v.* Goodenough, 26 Vt. 676; Lewis *v.* Palmer, 28 N. Y.

§ 2. **Definition in the Civil Law.** — In the civil law, the definitions of which have in the main been followed by our courts, subrogation has been defined as that change by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person who, by being subrogated to him, enters into his right.[3] It is a legal fiction, by force of which an obligation extinguished by a payment made by a third person [4] is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another.[5] The party who is subrogated is regarded as entitled to the same rights, and indeed as constituting one and the same person with the creditor whom he succeeds.[6] It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages,[7] being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior

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271; Smith *v.* Foran, 43 Conn. 244; Darst *v.* Thomas, 87 Ills. 222; Greenwell *v.* Heritage, 71 Mo. 459; Redington *v.* Cornwell, 90 Calif. 49.

[1] Harrison *v.* Bisland, 5 Rob. (La.) 204; Fort *v.* Union Bank, 11 La. Ann. 708; Roth *v.* Harkson, 18 La. Ann. 705; Stiewell *v.* Burdell, 18 La. Ann. 17; Brice *v.* Watkins, 30 La. Ann. 21; Gadsden *v.* Brown, 1 Speers Eq. (So. Car.) 41; Shinn *v.* Budd, 14 N. J. Eq. 234; Griffin *v.* Proctor, 14 Bush (Ky.), 571.

[2] Knouf's Appeal, 91 Penn. St. 78; Bender *v.* George, 92 Penn. St. 36; Lloyd *v.* Galbraith, 32 Penn. St. 103; McGinniss's Appeal, 16 Penn. St. 445; Keely *v.* Cassidy, 93 Penn. St. 318; Hatch *v.* Kimball, 16 Maine, 146; Reilly *v.* Mayer, 12 N. J. Eq. 55; Kelly *v.* Kelly, 54 Mich. 30; Longfellow, *in re*, 17 N. B. R. 27.

[3] Domat, Civ. Law, pt. I., l. III., t. 1, § 6; King *v.* Dwight, 3 Rob. (La.) 2.

[4] New Orleans Bank *v.* Eagle Cotton Co., 43 La. Ann. 814.

[5] Guyot, *Répertoire Universelle, Subrogation*, § 2; Merlin, *Inst. de Droit, Subrogatio.*

[6] Massé, *Droit Commerciel*, Payment in subrogation.

[7] Spiller *v.* Creditors, 16 La. Ann. 292.

incumbrance from the property on which he relies to secure his payment.[1]

§ 3. **Who will be subrogated.** — Subrogation, as a matter of right, independently of agreement, takes place for the benefit of insurers;[2] of one who, being himself a creditor, has satisfied the lien of a prior creditor;[3] of a purchaser who has extinguished an incumbrance upon the estate which he has purchased;[4] of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another;[5] of an heir who has paid the debts of the succession;[6] of one who has paid his own debt, the burden of which has, for a valuable consideration, been assumed by another;[7] or of a creditor, who is thereby enabled to subject to the payment of his demand securities or remedies held for its payment by those who are under merely a subsidiary liability to himself.[8] And there will be no subrogation unless the payment was made either under compulsion, or for the protection of some interest of the party making the payment, and in discharge of an existing liability.[9] The demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished;[1] but the doctrine of subrogation will be applied to reimburse one who has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property.[2] It will not be used to reimburse a father for the expense of supporting and educating his own children.[3] And it will be applied only in favor of one who has actually performed the obligations of another,[4] and thereby entitled himself to the rights and advantages incident to the discharge of such obligations. The mere extinguishment of another's right by legal means is not enough.[5] Consequently, a prior mortgagee acquires no right, by the foreclosure of his mortgage, to redeem from a lien subsequent to his own,[6] or to hold the surplus proceeds on the foreclosure of a junior mortgage.[7]

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[1] Griffin *v.* Orman, 9 Fla. 22; Shinn *v.* Budd, 14 N. J. Eq. 234; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370.

[2] *Postea*, § 221, *et seq.*

[3] Ellsworth *v.* Lockwood, 42 N. Y. 89; Mosier's Appeal, 56 Penn. St. 76; Miller *v.* Whittier, 36 Maine, 577.

[4] Kirkland, *in re*, 14 N. B. R. 139; Corbally *v.* Hughes, 59 Ga. 493; Armentrout *v.* Gibbons, 30 Gratt. (Va.) 632; Hays *v.* Dalton, 5 Lea (Tenn.), 555.

[5] Cottrell's Appeal, 23 Penn. St. 294; Young *v.* Vough, 23 N. J. Eq. 325; Silk *v.* Eyre, Irish Rep. 9 Eq. 393.

[6] Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 235; Brigden *v.* Cheever, 10 Mass. 450; Mitchell *v.* Mitchell, 8 Humph. (Tenn.) 359; *Tilghman, C. J.*, in Guier *v.* Kelly, 2 Binney (Penn.), 294, 299; Jenness *v.* Robinson, 10 N. H. 215.

[7] Kinnear *v.* Lowell, 34 Maine, 299; Henson *v.* Reed, 71 Tex. 726.

[8] *Postea*, §§ 85, 154 *et seq.*

[9] Webster's Appeal, 86 Penn. St. 409; Mosier's Appeal, 56 Penn. St. 76; Sanford *v.* M'Lean, 3 Paige (N. Y.), 117; Gadsden *v.* Brown, Speers Eq. (So. Car.) 37; Faurot *v.* Neff, 32 Ohio St. 44; Spray *v.* Rodman, 43 Ind. 225; Bunn *v.* Lindsay, 95 Mo. 250; Roth *v.* Harkson, 18 La. Ann. 705.

§ 4. **It is a Mode of Equitable Relief.** — Subrogation is an exercise of the equitable powers of the court, to relieve a meritorious creditor, who might otherwise be subjected to loss by his funds being applied to pay another's debt,[8] or by the operation of proceedings at law against the estate or funds of one who is indebted both to him and to others.[9] This remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor; and the principle is one of equity merely, and will be carried out in the exercise of a proper equitable discretion,[10] with a due regard to the legal and equitable rights of others.[1] One who claims this equity must be governed by the common maxim, *Sic utere tuo ut alienum non lædas.*[2] Being a doctrine of mere equity and benevolence, it will never be enforced at the expense of a legal right.[3] Thus, where the claim of a surety for money paid by him on a judgment against his principal has been defeated at law, the surety cannot in equity be substituted to the rights of the creditor in the original judgment,[4] as would otherwise be the case.[5] Nor can one by subrogation acquire the right to alter the disposition of a fund which has already been fixed by law.[6] And since no one can rest a claim to equitable redress upon his own wrong,[7] a collector of internal revenue who has, contrary to law, deposited taxes collected by him in a savings bank which has since failed, and who has thereupon paid the amount due to the United States from his own funds, will not be subrogated to the rights of the United States as a preferred creditor of the bank.[8] But upon making good to the government, in pursuance of his obligation so to do, the amount of a check lawfully received from a government debtor and subsequently dishonored, he may be subrogated to the rights of the government against that debtor.[9]

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[1] Shinn *v.* Budd, 14 N. J. Eq. 234; Webster's Appeal, 86 Penn. St. 409; McClure *v.* Andrews, 68 Ind. 97; Guy *v.* Du Uprey, 16 Calif. 195.

[2] Cole *v.* Malcolm, 66 N. Y. 363; Ellsworth *v.* Lockwood, 42 N. Y. 89; Bishop *v.* O'Conner, 69 Ills. 431; Suppiger *v.* Garrels, 20 Ill. Ap. 625; Whithed *v.* Pillsbury, 13 N. B. R. 241.

[3] Nunn *v.* Berger, 76 Ga. 705.

[4] Soulié *v.* Brown, 13 La. Ann. 521; Judah *v.* Judd, 1 Conn. 309; Hoover *v.* Epler, 52 Penn. St. 522; Carter *v.* Neal, 24 Ga. 346; Lee *v.* Swepson, 76 Va. 173.

[5] As in Parke *v.* Hush, 29 Minne. 434; Swan *v.* Emerson, 129 Mass. 289; and Lewis *v.* Caperton, 8 Gratt. (Va.) 148.

[6] Goodman *v.* White, 26 Conn. 317; Townsend *v.* Ward, 27 Conn. 610; Morris *v.* Oakford, 9 Penn. St. 498.

[7] Firestone *v.* State, 100 Ind 226.

[8] Evans *v.* Robertson, 54 Miss. 683; Campau *v.* Miller, 46 Mich. 148; Fulton *v.* Nicholson, 7 Md. 104.

[9] *Postea*, §§ 12, 61.

[10] Crawford *v.* Richeson, 101 Ills. 351; Greer *v.* Bush, 57 Miss. 575;

§ 5. **Doctrine adopted in Louisiana.** — In Louisiana, subrogation to the rights of a creditor in favor of a third person who pays him is either conventional or by operation of law.[10]

Ritter *v.* Cost, 99 Ind. 80; Forest Oil Co.'s Appeal, 118 Penn. St. 138; Blake *v.* Traders' Bank, 149 Mass. 250; Drake *v.* Paige, 127 N. Y. 562.

[1] Wagner *v.* Elliott, 95 Penn. St. 487; Rankin *v.* Coare, 46 N. J. Eq. 566; Dillow *v.* Warfel, 71 Iowa, 106; Jones *v.* Covington, 84 Va. 778.

[2] *Chambers, J.*, in McGinniss's Appeal, 16 Penn. St. 445, 447.

[3] Blake *v.* Koons, 71 Iowa, 357. *Postea*, §§ 63, 65, 79.

[4] Fink *v.* Mahaffy, 8 Watts (Penn.), 384.

[5] *Postea*, §§ 135–137.

[6] Williams *v.* Aylesbury Railw. Co., L. R. 9 Ch. 684. See Cooke, *in re*, 19 Fed. Rep. 88.

[7] *Postea*, § 44. Martin *v.* Parsons, 50 Calif. 498.

[8] Wilkinson *v.* Babbitt, 4 Dillon, C. C. 207.

[9] McBride, *in re*, 19 N. B. R. 452.

[10] See Nugent *v.* Potter, 21 La. Ann. 746.

Conventional subrogation, which is equivalent to an absolute transfer or assignment of the debt with its accessories,[1] takes place when the creditor, upon receiving payment from a third person, subrogates him to his own rights and remedies against the debtor;[2] this subrogation will not be implied, but must be formally expressed at the same time as the payment.[3] Legal subrogation, or subrogation by operation of law, takes place only for the benefit of one who, being himself a creditor, pays another creditor whose claim is preferable to his own by reason of privileges or mortgages; of a purchaser of immovable property who employs the purchase-money in paying mortgages upon the property; of one, who being bound with others or for others for the payment of a debt, had an interest in discharging it;[4] and of the beneficiary heir who has paid with his own funds the debts of the succession.[5] Thus, an agent who has paid over to his principal from his own funds the amount due upon a mortgage-note intrusted to him, no express subrogation having been made because the principal supposed that the money came from the debtor, acquires no interest in the note, but both that and the mortgage are extinguished;[6] if the agent's payment had been made in consequence of a legal obligation, subrogation might have been allowed.[7] And full payment of the amount agreed upon is a condition precedent of conventional, as well as of legal subrogation.[8]

§ 6. **Follows the Discharge of an Obligation. Adds Nothing to the Right.** — Subrogation to the rights of a creditor differs from an assignment of the debt, in that the latter assumes the continued existence of the debt, while the former follows only upon its payment.[1] Before the right of subrogation accrues, the legal obligation resting upon the ultimate debtor must be discharged.[2] But the subrogation of an insurer to the remedies of the insured for the destruction of the insured property proceeds rather upon an implied assignment than upon a satisfaction of the cause of action.[3] And the party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted;[4] if the latter had not a right of recovery, the former can acquire none.[5]

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[1] Lynch *v.* Kitchen, 2 La Ann. 843; Jack *v.* Harrison, 34 La. Ann. 736; Oakey *v.* Sheriff, 13 La. Ann. 273.

[2] Virgin's Succession, 18 La. Ann. 42.

[3] Harrison *v.* Bisland, 5 Rob. (La.) 204; Sewall *v.* Howard, 15 La. Ann. 400; Virgin's Succession, 18 La. Ann. 42; Hoyle *v.* Cazabat, 25 La. Ann. 438; Brice *v.* Watkins, 30 La. Ann. 21.

[4] Miss. & Mex. G. S. Canal Co. *v.* Noyes, 25 La. Ann. 62.

[5] Stiewell *v.* Burdell, 18 La. Ann. 17.

[6] Brice *v.* Watkins, 30 La. Ann. 21.

[7] *Postea*, § 10 *a*.

[8] Soulié *v.* Brown, 13 La. Ann. 521.

§ 7. **Instances. Subrogation of a Sheriff.** — Where a sheriff upon a void execution collected the amount due upon a valid judgment and paid it over to the judgment-creditor, the sheriff, upon the judgment-debtor's recovering a judgment against him for the amount so collected, was subrogated for his protection to the rights of the original judgment-creditor,[6] and also to the rights of the original defendant against the original plaintiff.[7] If a sheriff, at the request of the defendant in an execution which has been committed to him for collection, neglects to make a levy and collect the money and return the execution according to its command, thus making himself personally liable for the amount of the judgment, and then,

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[1] *Sutherland, J.*, in Ellsworth *v.* Lockwood, 42 N. Y. 89, 97; *Colt, J.*, in Lamb *v.* Montague, 112 Mass. 353.

[2] *Simrall, J.*, in Staples *v.* Fox, 45 Miss. 667, 680. *Postea*, § 45.

[3] Mason *v.* Sainsbury, 3 Doug. 61; London Ass. Co. *v.* Sainsbury, 3 Doug. 245; Yates *v.* Whyte, 4 Bing. N. C. 272; Hall *v.* Nashv. & Chatt. R. R. Co., 13 Wallace, 367; Hart *v.* Western R. R. Co., 13 Met. 99; Peoria Ins. Co. *v.* Frost, 37 Ills. 333.

[4] Knapp *v.* Sturges, 36 Vt. 721; Cooke *v.* Moore, 2 So. Car. 52; City Bank *v.* Smesson, 73 Ga. 422; Teague *v.* Corbitt, 57 Ala. 529; Campbell *v.* Elliott, 52 Tex. 151.

[5] Brown *v.* Houck, 41 Hun (N. Y.) 16; Miller *v.* Stout, 5 Del. Ch. 259; Harrington *v.* Fulton, *Id.* 492; Franklin Savings Bank *v.* Taylor, 131 Ills. 376; Alliance Ins. Co. *v.* Louisiana Ins. Co., 8 La. 11; Bank of Kentucky *v.* Milton, 12 B. Mon. (Ky.) 340; Simpson *v.* Thomson, 3 App. Cas. 279.

[6] Gillette *v.* Hill, 102 Ind. 531.

[7] Shaw *v.* Holmes, 4 Heisk. (Tenn.) 692.

stipulation that it shall be kept alive for his benefit will give him no right of subrogation;[1] nor will his payment made by arrangement with the debtor upon other security taken for his protection.[2] And this subrogation, though allowed against the judgment-creditor, has been limited so as not to override junior liens of other creditors nowise in fault.[3] If the liability of the sheriff is for not paying over to the creditor the avails of the defendant's property which he has sold on the execution, then he cannot be subrogated.[4] Nor can the sheriff be subrogated before he has made full payment, or had judgment rendered against him.[5] And his right of subrogation has been denied.[6] A judgment-debtor who has, in consequence of the sheriff's misconduct, been compelled to pay the judgment twice, may be subrogated for his remedy to the creditor's rights against the sheriff.[7] A tax-collector may be subrogated like a sheriff.[8]

§ 8. **Subrogation of one who has advanced Money for the payment of an Incumbrance.** — Where money has been loaned upon a defective mortgage for the purpose of discharging a prior valid incumbrance, and has actually been so applied, the mortgagee may be subrogated to the rights of the prior incumbrancer whom he has thus satisfied,[9] there being no intervening incumbrances.[1] But it is necessary both that the money should have been advanced for the purpose of discharging the prior incumbrance, and that it should actually have been so applied.[2] So, where a husband and wife gave a mortgage for money lent to them for the purpose of discharging a prior incumbrance, which was accordingly done, and the wife turned out to have been an infant at the time of the new mortgage, the mortgagee was subrogated to the rights of the prior incumbrancer as against the wife.[3] And if it is expressly agreed that the old incumbrance shall be kept alive as security for the new advance, but the debtor in fraud of his agreement procures it to be discharged, the person making the advance may be subrogated to the benefit of the prior lien, even against other incumbrancers prior to himself, whose rights have not been acquired on the faith of the apparent discharge.[4] One who had lent his notes to the purchaser of land to pay the price thereof was allowed upon payment of the notes to be subrogated to the benefit of a mortgage given by the purchaser to the vendor to secure their payment.[5] So, one who has, at the request of the owner of goods, advanced the money to discharge a lien thereon may retain possession of the goods until he shall be reimbursed.[6] But these are ex-

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[1] Bigelow *v.* Provost, 5 Hill (N. Y.), 566; Albany Bank *v.* Kearney, 9 Hun (N. Y.), 535; Arnett *v.* Cloud, 2 Ga. 53; Finn *v.* Stratton, 5 J. J. Marsh. (Ky.) 364; Garth *v.* McCampbell, 10 Mo. 154; Bailey *v.* Gibbs, 9 Mo. 45; Rutland *v.* Pippin, 7 Ala. 469.

[2] Rogers *v.* Nuttall, 10 Ired. Law (Nor. Car.), 347; Reed *v.* Pruyn, 7 Johns. (N. Y.) 426.

[3] Feamster *v.* Withrow, 12 W. Va. 612; Sherman *v.* Shaver, 75 Va. 1.

[4] Bellows *v.* Allen, 23 Vt. 169; Wright *v.* Fitzgerald, 17 Ohio St. 635.

[5] Beal *v.* Smithpeter, 6 Baxter (Tenn.), 356; Pool *v.* Hunter, 4 Jones Law (Nor. Car.), 144.

[6] Jones *v.* Wilson, 3 Johns. (N. Y.), 434; Menderback *v.* Hopkins, 8 Johns. (N. Y.) 436; Carpenter *v.* Stilwell, 11 N. Y. 61; Whittier *v.* Heminway, 22 Maine, 238; Albany Bank *v.* Kearney, 9 Hun (N. Y.), 535; Carpenter *v.* Fifield, 14 R. I. 73; Evans *v.* Billingsley, 32 Ala. 395; Roundtree *v.* Weaver, 8 Ala. 314.

[7] Harvey *v.* Warren, 31 Neb. 155. *Postea*, § 91.

[8] Meyer *v.* Burritt, 60 Conn. 117; Hook *v.* Richardson, 115 Ills. 431; White *v.* State, 51 Ga. 252; Thomas *v.* Hammer, 13 Lea (Tenn.), 620; Turner *v.* Teague, 73 Ala. 554.

[9] Lockwood *v.* Marsh, 3 Nevada,

138; Clark *v.* Clark, 58 Miss. 68; Emigrant Savings Bank *v.* Clute, 33 Hun (N. Y.), 82; s. c., affirmed in 2 Silvernail, N. Y. Ct. Appeals, 340; Bolman *v.* Lohman, 74 Ala. 507; Everston *v.* Kansas Bank, 33 Kans. 352; Critten *v.* Chappel, 35 Kans. 495; Gilbert *v.* Gilbert, 39 Iowa, 657. In the last case, a mortgage executed by a trustee who had the power to give mortgages for the discharge of a prior incumbrance, was invalid for lack of proper execution, and the plaintiff would have had no redress on his security but for the equitable doctrine of subrogation. The same rule was applied in Chaffee *v.* Oliver, 39 Ark. 531, and in Levy *v.* Martin, 48 Wisc. 198, but is not universally adopted. Fry *v.* Hammer, 50 Ala. 52; Ætna Ins. Co. *v.* Buck, 108 Ind. 174.

[1] Kitchell *v.* Mudgett, 37 Mich. 82.

[2] Barber *v.* Lyon, 15 Iowa, 37; Flannary *v.* Utley, 5 S. W. Rep. 878.

[3] Snelling *v.* McIntyre, 6 Abbott, N. Y. Cas. 469.

[4] Downer *v.* Miller, 15 Wisc. 612. See also White *v.* Knapp, 8 Paige Ch. (N. Y.) 173; Cole *v.* Edgerley, 48 Maine, 108.

[5] Chonler *v.* Smith, 3 Desaus. Eq. (So. Car.) 12.

[6] Edwards *v.* Frank, 40 Mich. 616.

treme cases.[1] If the title to land conveyed and accepted in discharge of a mortgage upon other property afterwards turns out to be defective, this defect, though it may be the subject of a new demand, cannot operate to revive the original mortgage, even with the mortgagor's consent, to the prejudice of rights acquired by others in the mean time.[2] And where a mortgage has been cancelled and discharged, and a new security upon the same land has been taken for the debt, the mortgage will, unless there are countervailing equities,[3] be regarded as if it had never existed, and intervening incumbrances or attachments will be let in.[4]

§ 9. **Of one who has been compelled to pay the Debt of another** — A third person who pays off a mortgage-debt for his own protection may be subrogated to the place of the mortgagee, and may retain the mortgage for his reimbursement.[5] One who pays taxes which are a lien upon land to which he must look for the payment of his debt,[6] or in which he has an apparent interest,[7] in order to preserve the property from the lien, will be entitled by subrogation to reimbursement out of the property itself. Where at an auction sale of a debtor's property, the debtor has fraudulently procured a sham bid to be made by an irresponsible person, and has thereby caused the land of another to be afterwards sold for the satisfaction of the debt which ought to have been discharged out of his own property, the party thus injured may, by subrogation to the rights of the original creditor, hold the primary debtor for the amount of his loss.[8] One who in good faith, believing himself to have an interest in property which is subject to a lien, pays off the lien to protect that interest, will in equity be subrogated for his reimbursement to the protection of that lien, as against the real owner of the property, who has stood by in silence while the payment was made.[1] So, a grantee of land who, through neglect to record his deed, has had the land taken from him upon a judgment recovered against his grantor, may by subrogation in equity claim the benefit of a mortgage held by the judgment-creditor to secure the debt upon which the judgment was rendered, so far as the same is not required for the full satisfaction of the debt, and to the extent of his loss by the levy upon his land. "The plaintiff," said Mr. Justice Chapman, "has paid his grantor's debt, which his grantor ought to have paid himself; and it is but just that he should have the benefit of the security which his grantor had previously given to the creditor for the debt."[2]

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[1] *Postea*, §§ 240 *et seq.*

[2] Lasselle *v.* Barnett, 1 Blackf. (Ind.) 150.

[3] Charleston Bank *v.* Epstin, 44 Fed. Rep. 403. *Postea*, § 20.

[4] Stearns *v.* Godfrey, 16 Maine, 158; Woollen *v.* Hillen, 9 Gill (Md.), 185.

[5] Coster, *in re*, 2 Johns. Ch. (N. Y.) 503. *Postea*, § 12 *et seq.*

[6] Broquet *v.* Sterling, 56 Iowa, 357; Waterson *v.* Devoe, 18 Kans. 223; Whittaker *v.* Wright, 35 Ark. 511.

[7] Arn *v.* Hoppen, 25 Kans. 707; Weimer *v.* Porter, 42 Mich. 569; Ingersoll *v.* Jeffords, 55 Miss. 37.

[8] Darst *v.* Thomas, 87 Ills. 222.

§ 10. **Of a Carrier.** — A carrier who has paid the charges of antecedent carriers for the transportation of goods sent over successive lines will be subrogated to their rights,[3] even though he afterwards fails to perform his own contract;[4] but this right will extend only to necessary charges for actual transportation.[5] And if property in a carrier's possession is lost or destroyed by the fault of another, the carrier will, upon saisfying the owners for such loss, be subrogated to their rights.[6] Thus, where notes issued by a bank had been stolen while in the course of transportation by an express company, and subsequently destroyed, and the company, being liable for the loss, paid the amount thereof, it was held that, upon such payment, the property in the notes vested in the express company; and, upon proof of their destruction, it was allowed to recover their amount from the bank.[1] So, where a carrier has by mistake delivered to one person goods which had been sold and consigned to another, and the former has appropriated them for his own use, the carrier, after satisfying the real owner for the loss, may recover the value of the goods from the person who has thus received them.[2] The carrier's agent, who made the mistake which created the carrier's liability, may, upon the carrier's satisfying the owner and such agent's reimbursing the carrier, be subrogated in the same way.[3] The carrier is subrogated to liens for charges which he is compelled to pay to obtain or to retain the goods.[4] A letter-carrier, who, having delivered to a hotel-clerk a valuable registered letter, has been held to pay for its loss arising from the clerk's negligence, will be subrogated to the remedy against the clerk, the party ultimately liable.[5]

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[1] Fowler *v.* Parsons, 143 Mass. 401; Cockrum *v.* West, 122 Ind. 372.

[2] Wall *v.* Mason, 102 Mass. 313; Weiss *v.* Guerineau, 109 Ind. 438.

[3] Lee *v.* Salter, Lalor's Sup. to Hill & Denio (N. Y.), 163; Hunt *v.* Haskell, 24 Maine, 339; Briggs *v.* Boston & Lowell R. R. Co., 6 Allen (Mass.), 246; White *v.* Vann, 6 Humph. (Tenn.) 70; Wells *v.* Thomas, 27 Mo. 17.

[4] Western Transportation Co. *v.* Hoyt, 69 N. Y. 230.

[5] Steamboat Virginia *v.* Kraft, 25 Mo. 76.

[6] United States *v.* Vermilye, 10 Blatchf. C. C. 280; Pierce *v.* Winser, 2 Sprague, 35; Brass *v.* Maitland, 6 Ellis & Bl. 470.

§ 10 *a*. **Of a Consignee or Agent.** — The consignee of property who has sold the same and deposited the proceeds in bank to the credit of the consignor, if afterwards on the failure of the bank obliged to pay the amount of such proceeds to the consignor, will be subrogated to the rights of the consignor against the insolvent bank and its assignee.[6] An agent's payment of the debt of a third party to his principal, made in discharge of a liability as guarantor or surety, or under compulsion of a judgment, will subrogate the agent to the principal's remedy against the third party.[7] So, an attorney, having become personally liable to his client for the amount of a judgment by reason of having neglected to compel the sheriff to pay over the amount collected thereon, is, by payment to his client, subrogated to his client's rights against the sheriff, and may for his own benefit enforce payment from the latter.[1]

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[1] Hagerstown Bank *v.* Adams Express Co., 45 Penn. St. 419.

[2] Brown *v.* Hodgson, 4 Taunt. 189; Coles *v.* Bulman, 6 C. B. 184.

[3] O'Neal *v.* Deese, 23 Ga. 477.

[4] Guesnard *v.* Louisville & Nashville R. R. Co., 76 Ala. 453.

[5] Joslyn *v.* King, 27 Neb. 38.

[6] Stoller *v.* Coates, 4 West. Rep. 600.

[7] Bank of Scotland *v.* Dominion Bank, (1891) 1 App. Cas. 592; Nichols *v.* Wadsworth, 40 Minne. 547.

§ 11. **General Doctrine of Subrogation.** — In short, the doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other,[2] and to indemnity from the fund out of which should have been made the payment which he has made.[3] To the creditor they may have been both equally liable; but if, as between themselves, there is a superior obligation resting upon one to pay the debt, the other, after paying it, may use the creditor's securities to obtain reimbursement. The doctrine does not depend upon privity,[4] nor is it confined to cases of suretyship, though in Massachusetts it has been refused at law on the ground of a lack of privity.[5] It is a mode which equity adopts, to compel the ultimate discharge of a debt by him who in equity and good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay.[6] Although, as between debtor and creditor, the debt may be extinguished, yet, as between the person who has paid the debt and the other parties, the debt is kept alive, so far as may be necessary to preserve the securities.[7] The payment of the money due upon a debt will operate as a discharge of the indebtedness, or as subrogating him who pays it to the place of the creditor, as may best serve the purposes of justice and the just intent of the parties.[1] But the burden is always on one who claims this equity to show that he is entitled to it.[2]

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[1] Governor *v.* Raley, 34 Ga. 173.

[2] City Bank *v.* Crossland, 65 Ga. 734; Thomas *v.* Bridges, 73 Mo. 530; Weiss *v.* Guerineau, 109 Ind. 438.

[3] Allen *v.* Williams, 33 N. J. Eq. 584; Darst *v.* Thomas, 87 Ills. 222.

[4] Eldridge *v.* Wright, 55 Calif. 531. *Postea*, § 93.

[5] Beck *v.* Gallagher, 114 Mass. 28; Holmes *v.* Day, 108 Mass. 563.

[6] *Strong, J.*, in McCormick *v.* Irwin, 35 Penn. St. 111, 117; Heart *v.* Bryan, 2 Dev. Eq. (Nor. Car.) 147.

[7] *Chapman, J.*, in Wall *v.* Mason, 102 Mass. 316.

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[1] *Parker, J.*, in Robinson *v.* Leavitt, 7 N. H. 99; Bacon *v.* Goodnow, 59 N. H. 415; Danville Poor District *v.* Montour County, 75 Penn. St. 35; Houston Bank *v.* Ackerman, 70 Tex. 315.

[2] Wilkinson *v.* Babbitt, 4 Dillon, C. C. 207; Hunnicutt *v.* Summy, 63 Ga. 586; Binford *v.* Adams, 104 Ind. 41; Griffith *v.* Townley, 69 Mo. 13.

Section

What is not a Waiver 42
Right lost by Negligence resulting in Prejudice to Others 43
Party seeking Subrogation must not be in his own Wrong 44
When one entitled to be subrogated to a Lien may demand an Assignment thereof 45
The real Debtor cannot be subrogated 46
Assignment to one who is bound to pay the Debt tantamount to a Discharge 47
Subrogation of Dowress who has paid a Paramount Lien on the Property 48
Widow's Right of Dower against a Purchaser who has paid an Incumbrance to which her Dower was subject 49
Dower let in, if Debt paid by one bound to pay it 50
The Widow may redeem. Her Rights thereupon 51
The Rule in Massachusetts . . . 52
Assignment of a Mortgage to the Owner of the Equity will not necessarily extinguish its Lien . 53
Tests by which Merger is determined 54
Incumbrance so assigned only kept Alive for a Good Purpose and to protect a Beneficial Estate . 55
Mortgage assigned to Principal Debtor is extinguished . . . 56
Conveyance of the Equity to the Holder of a Prior Incumbrance will not extinguish it in favor of a Junior 57
Conveyance of Equity in Payment of Prior, will not advance Junior Incumbrance 58
When a Conveyance of the Equity to the Mortgagee will be regarded as a Payment of the Mortgage-debt. 59
An Intervening Estate will prevent a Merger 60
The Doctrine of Two Funds . . . 61
A Creditor whose Fund has been taken to pay a Prior Debt subrogated to the Lien of that Debt upon other Funds 62
Doctrine of Two Funds not applied if it would work Injustice to Senior Creditor 63
Where one of the two Funds is itself Subject to Prior Incumbrances 64
Doctrine of Two Funds not applied where it would be Injurious to Third Parties 65
Where one of the Funds primarily liable for both Debts 66
Waiver of Right of Marshalling Assets . . . . 66 a
Junior Creditor cannot claim the Benefit of a Lien established subsequently to his own 67
Creditor subrogated only to a Fund which ought to have discharged the Debt his Fund has paid . . 68
Where each Creditor has a Lien upon the Same One of the Funds 68 a
Doctrine of Two Funds applied only if Debtors are the same . . . 69
Junior Creditor cannot be subrogated until Prior Creditor satisfied 70
Application of these Principles to a Case of Several Creditors of Joint and Several Debtors 71
Release by Prior Creditor of Fund primarily liable to him . . . 72
Release of Primary Fund will not prejudice Prior Creditor if made in Good Faith and Without Notice 73
Purchase of a Portion of an Incumbered Estate; Rights of the Purchaser 74
Order of Liability of Separate Parcels of an Incumbered Estate sold successively 75
Rule in Iowa and Kentucky . . . 76
No distinction between Mortgage and Judgment Lien or other Incumbrance 77
Release of Estate primarily liable discharges *pro tanto* that secondarily liable 78
Release of Estate primarily liable

SECTION
will not exonerate Estate secondarily liable unless in Justice it ought to have that effect . . . 79
Release of any Remedy to which a Subsequent Grantee would be subrogated releases the Lien on the latter's Property 80
Prior Incumbrancer not affected by Subsequent Alienations of the Property unless notified of them 81
SECTION
The Mortgagor may by Stipulation vary the Order of Liability . . 82
Extent of the Right of a Subsequent Purchaser 83
Instances of the Application of these Rules 84
When the Purchaser of an Equity of Redemption assumes the Payment of the Mortgage 85

§ 12. **Subrogation of a Junior Incumbrancer upon Payment of a Prior Incumbrance.** — All persons having an interest in property subject to an incumbrance by which their interest may be prejudiced or lost have a right to disengage the property from such incumbrance by the payment of the debt or charge which creates it;[1] and if such debt be one for which another party is ultimately liable, they will, upon their payment, be subrogated to the right of the creditor against the ultimate debtor,[2] and against the property upon which the debt was a charge.[3] A mortgagee can make no effectual resistance to a claim for subrogation by one who tenders to him his debt and costs, and who has a subordinate interest in the property, which would either be lost or seriously injured without the proposed substitution.[4] So, a second mortgagee who is in danger of losing his security by the foreclosure of the first mortgage may redeem from the first mortgagee, or pay the debt secured by the first mortgage, and may thereupon look to the mortgaged property for his reimbursement,[1] even against intervening incumbrances.[2] On the same principle, the lien of a pledgee will cover freight paid by him upon the goods pledged;[3] and as a carrier's lien for the carriage of the specific goods is prior to the vendor's right of stoppage *in transitu*, and the carrier may insist upon retaining possession until these charges are paid,[4] an officer who pays these charges to the carrier in order to obtain the goods for the vendor is substituted to the carrier's right of possession until he is repaid.[5] The general rule is that a lien-creditor, on paying the mortgage or other lien which is prior to his own, is subrogated by law to the rights of the creditor whose debt he has paid.[6] A second mortgagee who, to prevent a foreclosure of the first mortgage, redeems from it will be subrogated to its lien against an intervening or subsequent attachment,[7] and an assignment of the mortgage will not be necessary for this purpose.[8] Though a stranger cannot set up an outstanding satisfied mortgage as a basis of title to the property, yet the equitable owner of the land, whose debt it was not, but who has paid it in order to protect his property, may do so.[1] But a release from a prior to a subsequent mortgagee, nothing more appearing, will operate merely as an extinguishment of the mortgage.[2]

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[1] Powers *v.* Golden Lumber Co., 43 Mich. 468; Smith *v.* Provin, 4 Allen (Mass.), 516; Green *v.* Tanner, 8 Met. (Mass.) 411; Morse *v.* Smith, 83 Ills. 396; Willis *v.* Jelineck, 27 Minn. 18; Wiley *v.* Ewing, 47 Ala. 418; Scott *v.* Henry, 13 Ark. 112.

[2] Southworth *v.* Scofield, 51 N. Y. 513; Graham *v.* Dunnigan, 4 Abbott Pr. (N. Y.) 426; Lucking *v.* Wesson, 25 Mich. 443; Evans *v.* Saunders, 3 Lea (Tenn.), 734; Exall *v.* Partridge, 8 T. R. 308.

[3] Denman *v.* Nelson, 31 N. J. Eq. 452; Coster, *in re*, 2 Johns. Ch. (N. Y.) 503; Dings *v.* Parshall, 7 Hun (N. Y.), 522; Page *v.* Foster, 7 N. H. 392; Downer *v.* Fox, 20 Vt. 388; Young *v.* Williams, 17 Conn. 393; Mosier's Appeal, 56 Penn. St. 76; Darst *v.* Bates, 95 Ills. 493; Goode *v.* Cummings, 35 Iowa, 67; Darling *v.* Harmon, 47 Minn. 166; White *v.* Hampton, 13 Iowa, 259; Carter *v.* Taylor, 3 Head (Tenn.), 30; Staples *v.* Fox, 45 Miss. 667; Griswold *v.* Marshman, 2 Ch. Cas. 170.

[4] Davis *v.* Cook, 65 Ala. 617; McLean *v.* Tompkins, 18 Abbott Pr. (N. Y.) 24; Emigrant Savings Bank *v.* Clute, 33 Hun (N. Y.), 82.

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[1] Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Tarbell *v.* Durant, 61 Vt. 516; Wood *v.* Hubbard, 50 Vt. 82; Weld *v.* Sabin, 20 N. H. 533; State *v.* Brown, 73 Md. 484; Baker *v.* Pierson, 6 Mich. 522; Flachs *v.* Kelly, 30 Ills. 462; Marshall *v.* Ruddick, 28 Iowa, 487; Abbott *v.* Union Life Ins. Co., 127 Ind. 70; Arnold *v.* Foot, 7 B. Mon. (Ky.) 66.

[2] Conn. Ins. Co. *v.* Bulte, 45 Mich. 113; Erwin *v.* Acker, 126 Ind. 133; Walker *v.* Stone, 20 Md. 195; Allen *v.* Wood, 31 N. J. Eq. 103; Dillon *v.* Kauffman, 58 Tex. 696.

[3] Clark *v.* Dearborn, 103 Mass. 335.

[4] See Wolfe *v.* Crawford, 54 Miss. 514; Potts *v.* N. Y. & N. E. R. R. Co., 131 Mass. 455.

[5] Rucker *v.* Donovan, 13 Kans. 251.

[6] Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Brainard *v.* Cooper, 10 N. Y. 356; Brown *v.* Simons, 44 N. H. 475; Armstrong *v.* McAlpin, 18 Ohio St. 184; Russell *v.* Howard, 2 McLean C. C. 489; Southard *v.* Dorrington, 10 Nebraska, 119; Grigg *v.* Banks, 59 Ala. 311; Ventress *v.* Creditors, 20 La. Ann. 359.

[7] Ward *v.* Seymour, 51 Vt. 320; Downer *v.* Fox, 20 Vt. 388; Flachs *v.* Kelly, 30 Ills. 462.

[8] Moore *v.* Beasom, 44 N. H. 215; Reyburn *v.* Mitchell, 106 Mo. 367.

§ 13. **Subrogation will be made to serve the Purposes of Justice and the Intent of the Parties.** — "There are cases," said Mr. Justice Parker,[3] "in which a party who has paid money due upon a mortgage is entitled, for the purpose of effecting the substantial justice of the case, to be substituted in the place of the incumbrancer, and treated as assignee of the mortgage, and is enabled to hold the land as if assignee, notwithstanding the mortgage itself has been cancelled and the debt discharged.[4] The true principle, I apprehend, is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve the purposes of justice and the just intent of the parties.[5] Many cases state the rule in equity to be that the incumbrance shall be kept on foot or considered extinguished or merged, according to the intent or the interest of the party paying the money; but the decisions themselves, it is believed, will generally be found in accordance with the principle above stated.[6] There is another class of cases in which he who has paid money due upon a mortgage of land to which he had some title which might be affected or defeated by the mortgage, and who was thus entitled to redeem, has the right to consider the mortgage as subsisting in himself, and to hold the land as if it subsisted, until others interested in the redemption, or who held also the right to redeem, have paid a contribution.[1] And it makes no difference in either of these classes, as I conceive, whether the party on payment of the money took an assignment of the mortgage or a release, or whether a discharge was made and the evidence of the debt cancelled.[2] The debt itself may be held still to subsist in him who paid the money, as assignee; so far as it ought to subsist, in the nature of a lien upon the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned to him."[3]

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[1] Peltz *v.* Clarke, 5 Peters, 481; Bacon *v.* Van Schoonhoven, 19 Hun (N. Y.), 158.

[2] Hill *v.* West, 8 Ohio, 222.

[3] Robinson *v.* Leavitt, 7 N. H. 99 *et seq.*

[4] Citing Marsh *v.* Rice, 1 N. H. 167; Peltz *v.* Clarke, 5 Peters, 481; Coster, *in re*, 2 Johns. Ch. (N. Y.) 503; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Dale *v.* McEvers, 2 Cow. (N. Y.) 118.

[5] Citing Starr *v.* Ellis, 6 Johns. Ch. (N. Y.) 393. See also Hastings *v.* Stevens, 29 N. H. 564, 573; New Haven Savings Bank *v.* McPartlan, 40 Conn. 90; Devine *v.* Harkness, 117 Ills. 145.

[6] Citing Gardner *v.* Astor, 3 Johns. Ch. (N. Y.) 53; James *v.* Johnson, 6 Johns. Ch. (N. Y.) 425; s. c. on error, 2 Cow. (N. Y.) 246; Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35; Mills *v.* Comstock, 5 Johns. Ch. (N. Y.) 214; Freeman *v.* Paul, 3 Greenl. (Me.) 260; Thompson *v.* Chandler, 7 Greenl. (Me.) 377; Harvey *v.* Hurlburt, 3 Vt. 561; Marshall *v.* Wood, 5 Vt. 250; Lockwood *v.* Sturdevant, 6 Conn. 374; Kirkham *v.*

§ 14. **Subrogation upon Redemption from a Prior Incumbrance.** — One who has paid the money due upon a mortgage of lands to which he had a title that might have been defeated thereby has the right to hold the lands as if the mortgage subsisted and had been assigned to him,[4] until he has received the amount due upon it from some one who has the right to redeem, whether he took a discharge[5] or an assignment[6] of the mortgage. The mortgage may, for his benefit, be considered as still subsisting, though formally discharged, so far

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Smith, 1 Ves. Sen. 258; Shrewsbury *v.* Shrewsbury, 1 Ves. Jun. 227, 233; Compton *v.* Oxenden, 2 Ves. Jun. 261, 264; Forbes *v.* Moffatt, 18 Ves. 384; Buckinghamshire *v.* Hobart, 3 Swanst. 186.

[1] Citing Cass *v.* Martin, 6 N. H. 25; Swain *v.* Perine, 5 Johns. Ch. (N. Y.) 482–491; Carll *v.* Butman, 7 Greenl. (Me.) 102; Taylor *v.* Bassett, 3 N. H. 294; Russell *v.* Austin, 1 Paige (N. Y.), 192.

[2] Citing Snow *v.* Stevens, 15 Mass. 278; Barker *v.* Parker, 4 Pick. (Mass.) 505; Wade *v.* Howard, 6 Pick. (Mass.) 492.

[3] Citing Pratt *v.* Law, 9 Cranch, 456, 498.

[4] Twombly *v.* Cassidy, 82 N. Y. 155; Mix *v.* Hotckiss, 14 Conn. 32; Manwaring *v.* Powell, 40 Mich. 371; Taylor *v.* Heggie, 83 Nor. Car. 244.

[5] Arnold *v.* Green, 116 N. Y. 566; Farrell *v.* Lewis, 56 Conn. 280; Towle *v.* Hoit, 14 N. H. 61.

[6] White *v.* Hampton, 13 Iowa, 259.

as he ought in justice to hold the property.[1] So an incumbrancer may redeem from a paramount tax title, and be subrogated to it for his protection,[2] even against a prior mortgagee until reimbursed for his expenditures.[3] A tenant for life[4] or for years has the right to redeem from a mortgage which is prior to the creation of his tenancy, and upon redemption will be subrogated to the rights of the mortgagee against the mortgagor and the reversioner.[5] And in New Jersey he will have the right, upon redemption, to have the bond and mortgage delivered to him uncancelled, which in equity will be equivalent to an assignment of them to himself.[6] A mortgagee of a leasehold estate will have the right of subrogation upon redemption from a prior incumbrance.[7] But the tenant cannot hold the land against a prior incumbrancer by simply paying the interest as it accrues; nor can he, on paying the debt, require a formal assignment of the incumbrance.[8] He can only redeem, and then claim his subrogation.[9] And he must pay the entire amount of an incumbrance which is senior to his own estate, with whatever costs have accrued.[10]

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[1] Lewis *v.* Chittick, 25 Fed. Rep. 176; Cobb *v.* Dyer, 69 Maine, 494; Johnson *v.* Elliot, 26 N. H. 67; Heath *v.* West, 26 N. H. 191; Schissel *v.* Dickson, 129 Ind. 139; McClain *v.* Sullivan, 85 Ind. 174; Lamb *v.* Richards, 43 Ills. 312.

[2] Windett *v.* Union Ins. Co., 144 U. S. 581; Smith *v.* Roberts, 91 N. Y. 470; Athens Bank *v.* Danforth, 80 Ga. 55; Gwinn *v.* Smith, 55 Ga. 145; Stiger *v.* Bent, 111 Ills. 328; Pratt *v.* Pratt, 96 Ills. 184; Johnson *v.* Payne, 11 Nebraska, 269; Townsend *v.* Case Threshing Machine Co., 31 Neb. 836; Devin *v.* Eagleson, 79 Iowa, 269; Stanclift *v.* Norton, 11 Kans. 218; Sharp *v.* Barker, 11 Kans. 381.

[3] Fiacre *v.* Chapman, 32 N. J. Eq. 463.

[4] Crawford *v.* Carver, 16 Phila. 53.

[5] Averill *v.* Taylor, 8 N. Y. 44; Loud *v.* Lane, 8 Met. (Mass.) 517.

[6] Hamilton *v.* Dobbs, 19 N. J. Eq. 227.

[7] Campbell *v.* McAlevy, 3 Disney, (Ohio), 574.

[8] Magilton *v.* Holbert, 52 Hun (N. Y.), 444.

[9] Lamson *v.* Drake, 105 Mass. 564; Nelson *v.* Loder, 132 N. Y. 288; Bigelow *v.* Cassedy, 26 N. J. Eq. 557.

[10] O'Reilly *v.* Holt, 4 Woods, C. C. 645; Shutes *v.* Woodard, 57 Mich. 213; Union Ins. Co. *v.* Kirchoff, 133 Ills. 368; Merritt *v.* Hosmer, 11 Gray (Mass.), 276; Street *v.* Beal, 16 Iowa, 68; Massie *v.* Wilson, 16 Iowa, 390; Knowles *v.* Rablin, 20 Iowa, 101.

§ 15. **Subrogation of Junior Incumbrancer compelled to pay a Prior Charge.** — A mortgagee who has been compelled, in order to protect his title, to pay the amount due upon a prior mortgage, will be subrogated to the rights of the prior mortgagee, and may hold the land for the sum so paid by himself,[1] even against one whose title to the property has accrued after the discharge of the prior mortgage upon the record, if the whole amount claimed upon both mortgages is not greater than appears to be due by the record.[2] And he may also hold for the payment of the debt secured by the prior mortgage the parties who were personally liable therefor.[3] If his payment was made to the authorized attorney of the first mortgagee, and that attorney embezzled the amount, and then transferred the first mortgage overdue to a stranger, yet the junior mortgagee will be subrogated for his protection to the prior lien of the first mortgage which he has thus paid.[4] The payment by a junior mortgagee will not relieve the real debtor from his obligation.[5] A mortgagee who purchases, at the request of the debtor, a paramount lien on the mortgaged premises, with the express understanding that it shall be tacked to the mortgage and paid out of the fund, is entitled to have it so tacked to his mortgage and paid out of the mortgaged premises.[6] The necessary expenses incurred by a subsequent mortgagee to redeem from a prior mortgage which ought to have been paid by the mortgagor, or to remove a paramount right of dower, are justly chargeable by him upon the mortgaged estate.[7] And if a junior incumbrancer takes up

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[1] Citizens' Savings Bank *v.* Foster, 22 Abbott New Cases (N. Y.), 425; Porter *v.* Vanderlin, 146 Penn. St. 138; Hull *v.* Godfrey, 31 Neb. 204.

[2] Davis *v.* Winn, 2 Allen (Mass.), 111.

[3] Georgia Chemical Works *v.* Cartledge, 77 Ga. 547; Miller *v.* Aldrich, 31 Mich. 408; Mattison *v.* Marks, 31 Mich. 421.

[4] Sessions *v.* Kent, 75 Iowa, 601.

[5] Chandler *v.* Dyer, 37 Vt. 345, 354.

[6] Cullum *v.* Mobile Bank, 23 Ala. 797.

[7] Miller *v.* Whittier, 36 Maine, 577; Pierce *v.* Faunce, 53 Maine, 351.

§ 17. **Junior Incumbrancer's right of Redemption.** — A junior incumbrancer or claimant has the right to redeem from a prior mortgage by paying the amount which is due according to its terms as recorded;[1] the facts shown by the record cannot be contradicted to his prejudice.[2] When he offers to redeem, the prior mortgagee cannot tack to his demand another debt due to him from the mortgagor, not a charge upon the premises sought to be redeemed of which the junior incumbrancer was bound to take notice.[3] A latent equity of subrogation cannot be enforced against a subsequent *bona fide* purchaser for value without notice.[4] Even a mortgagee's right of subrogation to the benefit of prior liens discharged by him, if not appearing of record, cannot be enforced against those who have taken interests in reliance upon the record,[5] to an amount greater than the total sum which the record shows to be due.[6] As against the junior incumbrancer, no new terms can be incorporated into the prior mortgage, no new indebtedness can be secured by it.[7] Thus, where the parties to the mortgage stipulated for the payment of a higher rate of interest upon the mortgage-debt than was provided for by the terms of the mortgage as recorded, it was held that the excess of interest could not be made a lien upon the land to the prejudice of subsequent incumbrancers,[8] or of purchasers without notice.[9] Payments made by the mortgagor upon the indebtedness secured by the first mortgage cannot afterwards be transferred to another account, to the prejudice of a second incumbrancer, by the mortgagor and the first mortgagee.[1] Where property was subject to the lien of a judgment, and then to four successive mortgages, and the holder of the judgment agreed with the fourth mortgagee to postpone his lien to that of the fourth mortgagee, and then sold the property under his judgment to the first mortgagee, who had no notice of this agreement, it was held that the first mortgagee was by his purchase subrogated to the lien of the judgment, and that the fourth mortgagee could not redeem from him without paying the cost of buying in the property under the judgment as well as the amount which was due upon the first mortgage;[2] and though this decision was reversed on appeal, the general principle was not doubted, but it was decided on the ground that the purchaser of real estate sold on execution acquires no other or better title than would have vested in the judgment-creditor had the latter purchased the property.[3]

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[1] Whittacre *v.* Fuller, 5 Minn. 508.

[2] Gibbons *v.* Hoag, 95 Ills. 45; Eagle Beneficial Society's Appeal, 75 Penn. St. 226.

[3] Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35; Lee *v.* Stone, 5 Gill & J. (Md.) 1; McGuire *v.* Wilkinson, 72 Mo. 199.

[4] Richards *v.* Griffith, 92 Calif. 493.

[5] Wilson *v.* Barker, 50 Maine, 447; Ahern *v.* Freeman, 46 Minne. 156; Persons *v.* Shaeffer, 65 Calif. 79.

[6] Davis *v.* Winn, 2 Allen (Mass.), 111.

[7] Trimble *v.* Hunter, 104 Nor. Car. 129; Kistler *v.* Mosser, 140 Penn. St. 367.

[8] Gardner *v.* Emerson, 40 Ills. 296; Perrin *v.* Kellogg, 38 Mich. 720.

[9] Bassett *v.* McDonnel, 13 Wisc. 444; Burchard *v.* Frazer, 23 Mich. 224.

§ 18. **When Junior Incumbrancer entitled to Subrogation.** — Although a junior incumbrancer is entitled to redeem from a prior mortgage, and although, if he is not himself the principal debtor, but is compelled to redeem for the protection of his own lien upon the premises, he will upon redemption be subrogated for his reimbursement to the rights of the senior mortgagee,[4] yet, if the debt secured by his own mortgage is not yet due or payable, he cannot insist upon his right to pay off the first mortgage and to be subrogated to the position of the prior mortgagee, without showing that this is necessary for his own protection or for the preservation of his own security. Subrogation in equity proceeds upon the ground that it is necessary for the protection of the party who seeks it;[1] and this will be the case when it is necessary for him, in order to get the benefit of his own security, to disengage the property from the previous incumbrance. If his own mortgage is payable, and he cannot get his payment without clearing away the previous incumbrance,[2] or if the prior mortgagee is himself seeking to foreclose, then he may rightfully insist upon redeeming and upon being subrogated to the rights of the prior mortgagee.[3] After a decree for the foreclosure of a prior mortgage has been rendered in proceedings to which the junior incumbrancer was a party, the latter cannot then claim a decree of subrogation, or prevent the sale of the premises, unless he can show that the payment of the prior mortgage or its enforcement by foreclosure and sale would work him an injustice; his application comes too late;[4] as mere junior mortgagee, his rights are sufficiently protected by the opportunity to purchase at the sale, or to pay off the prior incumbrance before the sale.[5]

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[1] York County Savings Bank *v.* Roberts, 70 Maine, 384; Hayden *v.* Auburn Prison, 1 Sandf. (N. Y.) 195; Marvin *v.* Vedder, 5 Cow. (N. Y.) 671; Warner *v.* Blakeman, 36 Barb. (N. Y.) 501; Gardner *v.* James, 7 R. I. 396; Bowman *v.* Master, 33 N. H. 530; Large *v.* Van Doren, 14 N. J. Eq. 208. But see Sims *v.* Lester, 55 Ga. 620.

[2] Frost *v.* Yonkers Bank, 8 Hun (N. Y.), 26.

[3] Frost *v.* Yonkers Bank, 70 N. Y. 553. *Postea*, § 39.

[4] *Antea*, §§ 12-15.

§ 19. **Subrogation of one advancing Money for the Payment of an Incumbrance.** — Where a person advances money to pay off a mortgage-debt under an agreement with the owner of the equity of redemption or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage;[6] though, if he was not intended to

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[1] *Antea*, § 4.

[2] Kelly *v.* Longshore, 78 Ala. 203.

[3] Jenkins *v.* Continental Ins. Co., 12 How. Pr. (N. Y.) 66.

[4] Searles *v.* Jacksonville R. R. Co., 2 Woods, C. C. 621. See also Gerrish *v.* Bragg, 55 Vt. 329; Phelps *v.* Pope, 53 Iowa, 691.

[5] Bloomingdale *v.* Barnard, 7 Hun (N. Y.), 459; Ketchum *v.* Crippen, 37 Calif. 223; Searles *v.* Jacksonville R. R. Co., 2 Woods, C. C. 621. See Wyckoff *v.* Noyes, 36 N. J. Eq. 227.

[6] Cottrell *v.* Finney, L. R. 9 Ch. 541; King *v.* McVickar, 3 Sandf. Ch. (N. Y.) 192; Detroit Ins. Co. *v.* As-

residue of the stock, which residue was to be applied in paying unpaid vendors of land. Debenture B stock was to be applied in paying off debentures of the company which were not secured by mortgage, and in meeting other debts. The net income of the company was to be applied to pay, first, interest on preferred debenture A stock; second, interest on the residue of that stock; third, interest on debenture B stock; and, lastly, such dividends as might be payable to stockholders. The plaintiff contended that he was not bound by the scheme, and that he had a charge on the income prior to the holders of the A and B stocks, on the ground that the original priority of former mortgagees and unpaid vendors of land, who had accepted payment in these new stocks, had been lost by the extinguishment of their original securities. But it was held that though he was not bound by the scheme, yet as it did not lessen his rights, so neither did it increase them; that he was not, therefore, entitled to such priority as he claimed; but that the net income must, in the first place, to an amount equal to the sums due upon liens which had been prior to the plaintiff's, be applied according to the scheme.[1] So the lender of money borrowed by a corporation *ultra vires* may be subrogated to the rights of lawful creditors of the company who have been paid out of such money, and allowed to recover from the company to the extent of the lawful liabilities so paid off.[2] For the prevention of fraud, a person who advances money to pay off a mortgage, believing that it was the only lien upon the land, may be subrogated to the lien of that mortgage,[3] as against a surety who has paid a judgment, which was a lien subsequent to the mortgage, and the payment of which appeared by the record to have been otherwise provided for.[1] One who had paid off a mortgage-debt under the mistaken belief that the title to the land was in his wife, while it really belonged to her daughter by a previous marriage, was allowed against the daughter a charge upon the land to reimburse him for this payment,[2] but not for improvements which he had made upon the land.[3] But a husband who, being sued with his wife for her debt contracted before marriage, and secûred by a mortgage upon her land, allows himself after her death to be defaulted in the suit and pays the debt on execution, under the mistaken[4] supposition that he can claim the amount of her estate at law, without taking an assignment of the mortgage, cannot be subrogated to the rights of the mortgagee for his reimbursement; for he paid the debt, not to protect an imaginary estate in himself or his wife, but under a mistaken belief of his legal liability therefor.[5] Though a mere volunteer cannot by paying off a mortgage acquire an equitable lien or any right of subrogation, yet if he advances the money to redeem or pay off a mortgage at the request of one who is interested or bound to discharge it, he may be protected against such person by subrogation.[6] A third party, who, at the instance of the mortgagor, pays a part of the mortgage-debt, but takes no assignment of the mortgage, is not thereby subrogated to the rights of the mortgagee as against a subsequent incumbrancer; to effect such a subrogation there must be something more than a mere payment of the money, and its silent receipt by the first mortgagee;[1] nor will he be subrogated to the benefit of the mortgage as against others who are secured thereby, by his having furnished the debtor with the means to make a partial payment of the mortgage-debt,[2] even though he holds the agreement of the mortgagor that he shall be protected by the mortgage.[3] The mortgagor's agreement cannot prejudice the mortgagees, though it would bind the mortgagor himself.[4]

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[1] Stevens *v.* Mid-Hants Railway Co., L. R. 8 Ch. 1064. So in Campbell *v.* Texas R. R. Co., 2 Woods C. C. 263; Barry *v.* Missouri, K. & T. R. R. Co., 34 Fed. Rep. 829; Hollister *v.* Stewart, 111 N. Y. 644; Humphreys *v.* Allen, 100 Ills. 511.

[2] Brooks *v.* Blackburn Building Society, 9 App. Cas. 857; Blackburn Building Society *v.* Cunliff, 22 Ch. D. 61; Wenlock *v.* River Dee Co., 19 Q. B. D. 155, and 10 App. Cas. 354; Rainsburg Borough *v.* Fyan, 127 Penn. St. 74.

[3] Edwards *v.* Davenport, 20 Fed. Rep. 756; White *v.* Newhall, 68 Mich. 641; Chaffe *v.* Patterson, 61 Miss. 28.

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[1] Green *v.* Millbank, 3 Abbott New Cas. (N. Y.) 138. And see Burchard *v.* Phillips, 11 Paige (N. Y.), 66.

[2] Haggerty *v.* McCanna, 10 C. E. Green (25 N. J. Eq.), 48.

[3] Haggerty *v.* McCanna, *supra;* Guckian *v.* Riley, 135 Mass. 71; O'Brien *v.* Joyce, 117 Mass. 360.

[4] Warren *v.* Williams, 10 Cush. (Mass.) 79.

[5] Warren *v.* Jennison, 6 Gray (Mass.), 559; and see Peters *v.* Florence, 38 Penn. St. 194.

[6] Gans *v.* Thieme, 93 N. Y. 225; Robertson *v.* Mowell, 66 Md. 530; McWilliams *v.* Bones, 84 Ga. 203; White *v.* Newhall, 68 Mich. 641; Yaple *v.* Stephens, 36 Kans. 680; Tolman *v* Smith, 85 Calif. 280; Fievel *v.* Zuber, 67 Tex. 275.

§ 20. **Where New Incumbrance given for old.**— Where a new mortgage is given for the same debt which was secured by a prior mortgage, which is thereupon discharged, the execution of the new and the satisfaction of the old mortgage have been treated as simultaneous and dependent acts; and if the new mortgage is invalid, its holder has been subrogated to the lien of the old mortgage.[5] But if the new mortgage covers also an additional indebtedness, this subrogation can protect only what remains due upon the old mortgage-debt.[6] The same rule is applied where the new and defective mortgage is given to one who at the request of the debtor advances the money to pay off the prior incumbrance, the transaction being treated in equity as an assignment of the old mortgage to the new mortgagee.[7] *A fortiori*, if the old mortgage is re-

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[1] Commonwealth *v.* Chesapeake & Ohio Canal Co., 32 Md. 501; Collins *v.* Adams, 53 Vt. 433; Greer *v.* Chester, 7 Humph. (Tenn) 77.

[2] Bissell *v.* Lewis, 56 Iowa, 231; Bockes *v.* Hathorn, 20 Hun (N. Y.), 503.

[3] Child *v.* N. Y. & N. E. R. R. Co., 129 Mass. 170.

[4] Cameron *v.* Tome, 64 Md. 507; Haven *v.* Grand Junction R. R. Co., 109 Mass. 88.

[5] Milholland *v.* Tiffany, 64 Md. 455; Donohue *v.* Daniel, 58 Md. 595; Lockwood *v.* Bassett, 49 Mich. 547; Pouder *v.* Ritzinger, 102 Ind. 571; Gerwig *v.* Shetterly, 64 Barb. (N. Y.) 620; Christie *v.* Hale, 46 Ills. 117; Kimble *v.* Esworthy, 6 Ills. Ap. 517; Jones *v.* Parker, 51 Wisc. 218; Crippin *v.* Chappel, 35 Kans. 495; Dillon *v.* Byrne, 5 Calif. 455; Birrell *v.* Schie, 9 Calif. 104; Hazleton *v.* Lesure, 9 Allen (Mass.), 24; Kalscheuer *v.* Upton, 43 N. W. Rep. 816.

[6] Carr *v.* Caldwell, 10 Calif. 380; Birrell *v.* Schie, *supra;* Dillon *v.* Byrne, 5 Calif. 455.

[7] Swift *v.* Kraemer, 13 Calif. 526; Carr *v.* Caldwell, 10 Calif. 380; Ho-

new security is taken for the express purpose of gaining an advantage which could not have been enjoyed under the first, the first will likewise be extinguished; as where a creditor who held a note secured by a mortgage upon a stock of goods, being told by the debtor that he had a number of notes coming due which he could not pay, delivered up his note and mortgage, and took a new note secured by a new mortgage upon the stock as altered and added to by labor, sales, and purchases, and it was held that he could not, upon the avoidance of his new mortgage, be subrogated to the lien of his former security.[1] But if an intervening incumbrance were created without the knowledge of the beneficiary therein just prior to the execution of the new mortgage, with the fraudulent intention of giving it priority over the latter, it would not be allowed a preference over such new mortgage.[2] And if a first mortgagee has accepted a new mortgage and surrendered his prior security for cancellation in ignorance of the existence of an intervening lien, equity will, upon his prompt application and in the absence of laches or other disqualifying facts,[3] restore him to his original position.[4] If a mortgage has not been formally discharged, but the mortgagor has obtained from the mortgagee possession of it and of the note which it secures, by means of a fraudulent pretence of payment, the mortgagee may yet foreclose the same, both against the mortgagor himself and also against those who have

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Id. 527; Wagner's Appeal, 98 Penn. St. 77; Calmes *v.* McCracken, 8 So. Car. 87; Anglade *v.* St. Avit, 67 Mo. 434.

[1] Paine *v.* Waite, 11 Gray (Mass.), 190.

[2] Eggeman *v.* Eggeman, 37 Mich. 436; Waldo *v.* Richmond, 40 Mich. 380; Short *v.* Currier, 153 Mass. 182.

[3] Childs *v.* Stoddard, 130 Mass. 110; Seymour *v.* Mackay, 126 Ills. 341; Dutton *v.* McReynolds, 31 Minn. 66.

[4] Keller *v.* Hannah, 52 Mich. 535; Sledge *v.* Obenchain, 58 Miss. 670; Young *v.* Sharer, 73 Iowa, 555; Clark *v.* Bullard, 66 Iowa, 747; Bruse *v.* Nelson, 35 Iowa, 157; Campbell *v.* Trotter, 100 Ills. 281; Hutchinson *v.* Swartsweller, 31 N. J. Eq. 205; McKenzie *v.* McKenzie, 52 Vt. 271; Stafford *v.* Ballou, 17 Vt. 329; Lambert *v.* Leland, 2 Sweeny (N. Y.), 218; Wright *v.* Walter, McArthur & Mackey (D. C.), 343; Wooster *v.* Cavender, 54 Ark. 153.

acquired rights under him in ignorance of the apparent satisfaction.[1] A formal record discharge of a mortgage improvidently made by the administrator of the mortgagee, without the knowledge of the mortgagor and without consideration, will not necessarily discharge the mortgage, no other rights having intervened.[2] A mortgagee or other lien creditor who has been induced to surrender his security by the mere fraud of his debtor, may in equity have it reinstated and enforced as if no such surrender had been made;[3] but innocent third parties who have, after such surrender and before the revival of the incumbrance, parted with their money upon the faith of the apparent surrender, will not be prejudiced by the revival.[4] The same rule will be applied for the protection of the assignee of a mortgage which, before the recording of the assignment, has by mistake merely been discharged of record by the original mortgagee;[5] and if intervening incumbrancers, having come in without notice of his rights, are entitled to priority over him, he may upon paying them be subrogated to their rights.[6] Where a mortgagor made a subsequent equitable charge upon his equity of redemption, and then requested the defendant, who had no notice of the charge, to pay off the mortgage, which was done, and a receipt was indorsed upon the mortgage, and the title-deeds were handed over to the defendant, and the mortgagor then gave to the defendant a new mortgage to secure both the amount he had thus paid to the prior mortgagee and also a new advance made by himself to the mortgagor, it was held that the defendant's subsequent mortgage had priority over the equitable charge, but only to the extent of the prior mortgage which he had paid off;[1] and even this limitation has since been disapproved.[2]

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[1] Grimes *v.* Kimball, 8 Allen (Mass.), 153. And see Robinson *v.* Sampson, 23 Maine, 388; Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117; Mallett *v.* Page, 8 Ind. 364.

[2] Hay *v.* Washington & Alex. R. R. Co., 4 Hughes C. C. 327, and 1 *Id.* 168; Hammond *v.* Barker, 61 N. H. 53; Bond *v.* Dorsey, 65 Md. 310; Moore *v.* Bond, 75 Nor. Car. 243; Ferguson *v.* Glassford, 68 Mich. 36; Hanlon *v.* Doherty, 109 Ind. 37; Liggett *v.* Himle, 38 Minn. 421.

[3] Short *v.* Currier, 153 Mass. 182; Clark *v.* McNeal, 114 N. Y. 287; Stover *v.* Wood, 26 N. J. Eq. 417; Callahan's Appeal, 124 Penn. St. 138; Crumlish *v.* Railroad Co., 32 W. Va. 244; French *v.* De Bow, 38 Mich. 708; Farmers' Ins. Co. *v.* German Ins. Co., 79 Ky. 598; Sidener *v.* Pavey, 77 Ind. 241; Fouch *v.* Wilson, 60 Ind. 64; Rand *v.* Barrett, 66 Iowa, 731; Hait *v.* Ensign, 61 Iowa, 724; Ellis *v.* Lindley, 37 Iowa, 334; Geib *v.* Reynolds, 35 Minn. 331; Aldrich *v.* Willis, 55 Calif. 81.

[4] Heyder *v.* Excelsior Building Association, 42 N. J. Eq. 403; Gaskill *v.* Wales, 36 N. J. Eq. 527; Harner's Appeal, 94 Penn. St. 489; Charleston *v.* Ryan, 22 So. Car. 339; Beal *v.* Stevens, 72 Calif. 451; Edwards *v.* Thom, 25 Fla. 222; Morris *v.* Beecher, 1 Nor. Dak. 130; Vannice *v.* Bergen, 16 Iowa, 555.

[5] Willcox *v.* Foster, 132 Mass. 320.

[6] Clark *v.* Mckin, 95 N. Y. 346.

§ 21. **Holder under a Judgment Lien subrogated upon paying Prior Incumbrance.** — Where a judgment-creditor levied his execution upon land, the whole of which was subject to a prior mortgage, and the debtor was entitled, as against the judgment-creditor, to hold part of the land as a homestead, and had the same set off to himself, and afterwards the creditor was obliged to pay off the whole mortgage, which was superior to the homestead estate, it was held that the creditor was subrogated by his payment to all the rights of the mortgagee, and might enforce against the homestead estate the contribution of its proportional share of the mortgage-debt.[3] One who levies an execution upon an equity of redemption, and then pays off the mortgages to which his levy was subject, becomes by such payment the equitable assignee of the mortgages, and is subrogated to all the rights of the mortgagees in the mortgaged premises.[4] So where the purchaser of an

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[1] Pease *v.* Jackson, L. R. 3 Ch. 576. So in Howell *v.* Bush, 54 Miss. 437; Cansler *v.* Sallis, *Id.* 446.

[2] Hosking *v.* Smith, 13 Ap. Cas. 582, overruling on this question Pease *v.* Jackson, *supra*, and Robinson *v.* Trevor, 12 Q. B. D. 423. So, also, Sangster *v.* Cochran, 28 Ch. D. 298; Carlisle Banking Co. *v.* Thompson, 28 Ch. D. 398; Fourth City Building Society *v.* Williams, 14 Ch. D. 140.

[3] Lamb *v.* Mason, 50 Vt. 345; Devereux *v.* Fairbanks, 50 Vt. 700.

[4] Warren *v.* Warren, 30 Vt. 530; Majury *v.* Putnam, 4 Dane's Ab. (Mass.) 183, 676; Tiffany *v.* Kent, 2 Gratt. (Va.) 231; Hammond *v.* Leavitt, 59 Iowa, 407; Lane *v.* Hallum, 38 Ark. 385; Eldridge *v.* Wright, 55 Calif. 531.

the prior incumbrance is discharged by his payment, to the extent of the value of the property;[1] on the contrary, if payment of the mortgage-debt is then enforced by its holder from other property of the mortgagor, the latter will be subrogated to the mortgagee's lien upon the land, that he may indemnify himself out of the mortgaged premises,[2] as he will be if upon his payment he takes an express assignment of the mortgage which he has given.[3] And such a purchaser has no equity to require the mortgagee to apply to the satisfaction of his demand personal property which is also embraced in his mortgage.[4] But the rule is different before the consummation of the sale, while the junior incumbrance remains merely a subordinate lien upon the premises; then the owner of the equity, if he wishes to preserve his estate, must redeem it from all the incumbrances to which it is subject;[5] and the junior incumbrancer may pay off the debt secured by the prior lien, and enforce it against the property.[6] But there is no personal charge upon such a purchaser of the equity of redemption: if he takes an assignment of the prior mortgage, and forecloses it, and sells the property for less than the amount of the debt secured thereby, he can then maintain an action for the balance of the debt against the mortgagor; though the land has become the primary fund for the payment of the debt, yet the original debtor remains liable for what the land fails to pay.[7] And the original debtor will have no defence to an action at law by the first mortgagee against him to collect the indebtedness secured by the mortgage, although another creditor has

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Appeal, 1 Grant, Pa. Cas. 401; Semans *v.* Harvey, 52 Ind. 331.

[1] Booker *v.* Anderson, 35 Ills. 66; Waddle *v.* Cureton, 2 Spears (So. Car.), 53.

[2] Hart *v.* Chase, 46 Conn. 207; Funk *v.* McReynolds, 33 Ills. 481; Cox *v.* Wheeler, 7 Paige (N. Y.), 248; Tice *v.* Annin, 2 Johns. Ch. (N. Y.) 125.

[3] Barker *v.* Parker, 4 Pick. (Mass.) 505.

[4] Lovelace *v.* Webb, 62 Ala. 271; Dirks *v.* Humbird, 54 Md. 399.

[5] Rogers *v.* Meyers, 68 Ills. 92.

[6] Southworth *v.* Scofield, 51 N. Y. 513.

[7] Southworth *v.* Scofield, *supra.*

levied on his equity of redemption; he cannot compel the purchaser at the execution sale to redeem from the prior mortgage; he must himself, where the law gives him the power to do so, redeem both from the prior mortgage and from the execution sale, or lose the land.[1] So, one who levies upon part of an equity of redemption, and then pays off and takes an assignment of the mortgages to which his levy was subject, becomes thereby entitled to the rights of the mortgagees in the whole of the premises.[2] Where mortgaged land was successively attached by two different creditors of the mortgagor, and the first attaching creditor, having obtained judgment, levied on the equity of redemption, and sold it on his execution subject to the mortgage, and then the mortgagee released and quitclaimed his right in the land to the mortgagor, it was held that the original mortgagor became thereupon invested as to the land with the character of a mortgagee, and that a deed of release and quitclaim given by him to the purchaser of the equity of redemption at the execution sale vested the whole title to the land in the latter to the exclusion of the second attaching creditor.[3]

§ 23. **Subrogation of an Assignee in Bankruptcy.** — Assignees in bankruptcy will, upon redeeming pledges made by the bankrupt, be subrogated to the rights of the pledgees, until the fund for general distribution is made good from the proceeds of the pledges redeemed.[4] If the property of a bankrupt was subject both to attachments and to subsequent levies, it has been said that the dissolution of the attachments by the bankruptcy proceedings will not advance the levies, but the assignee will be subrogated to the priority of the dissolved attachments,[5] though this proposition is neither self-evident nor universally admitted.[1] And if a creditor of the bankrupt holding security for the payment of his debt proves it as an unsecured demand, and thereby waives his security, this will not extinguish the security for the benefit of other parties claiming the property subject to the rights of the creditor, but paramount to the title of the assignee; but the assignee will, for the benefit of the general fund, be subrogated to the security thus waived by the creditor.[2] But it is only the assignee who will be thus subrogated; a junior claimant of the security thus waived will acquire no advantage by the waiver.[3] A junior lien, though valid against the assignee, will not be advanced by the assignee's avoidance of the prior lien.[4] If the secured creditor proves his whole claim against the bankrupt's estate, and thus diminishes the dividend of the general creditors, they, or the assignee as their representative, will be subrogated to his rights under his security and allowed to enforce the same against those whose rights were subject to his.[5] A creditor who has proved his demand against the bankrupt estate of one who was under a subsidiary liability for the debt, though entitled to receive his dividend, may yet be compelled by the assignee either to proceed himself at law against the ultimate debtor, or to allow the assignee to do so in his name.[6]

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[1] Rogers *v.* Meyers, 68 Ills. 92.

[2] Tichout *v.* Harmon, 2 Aik. (Vt.) 37; Wheeler *v.* Willard, 44 Vt. 640; Tuttle *v.* Brown, 14 Pick. (Mass.) 514.

[3] Bullard *v.* Hinckley, 5 Greenl. (Me.) 272.

[4] McLean *v.* Cadwalader, 15 N. B. R. 383; Longfellow, *in re*, 17 *Id.* 27.

[5] Matter of Klancke, 4 Benedict,

§ 24. **Subrogation of a Mortgagor against a Purchaser of the Equity who has assumed the Mortgage.** — Where the purchaser of an equity of redemption who has agreed with the mortgagor to assume and pay the mortgage-debt, fails to do so, the mort-

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326; Steele, *in re*, 7 Bissell, 504; s. c. 16 N. B. R. 105; Nelson, *in re*, 16 N. B. R. 312.

[1] See the opinion of the court in Grant *v.* Lyman, 4 Met. (Mass.) 470, 474; Hull, *in re*, 14 Blatchford, C. C. 257; s. c. 18 N. B. R. 1; Beadle, *in re*, 2 Sawyer, C. C. 351.

[2] Hiscock *v.* Jaycox, 12 N. B. R. 507; Wallace *v.* Conrad, 3 N. B. R. 41.

[3] Cook *v.* Farrington, 104 Mass. 212.

[4] Beisenthal, *in re*, 14 Blatchford, C. C. 146.

[5] *Thayer, J.*, in Wallace *v.* Conrad, *supra*.

[6] Babcock, *in re*, 3 Story, C. C. 393.

gagor was, as against a second mortgagee from a later owner of the premises, subrogated to the rights of the first mortgagee in the mortgaged premises.[1] If a purchaser from the mortgagor has agreed to assume and pay the mortgage-debt, such purchaser and the original mortgagor stand to each other in the relation of principal and surety; the latter is *quasi* surety for the former for the payment of the mortgage-debt.[2] The rule is the same if the payment, instead of being made by the mortgagor personally, is realized from the proceeds of collateral security deposited by him with the mortgagee,[3] or by the levy of execution upon other property of the mortgagor.[4] Each successive purchaser of the premises who assumes the payment of the mortgage becomes in his turn the party ultimately liable to bear the burden of the debt,[5] and his payment will extinguish the debt;[6] but such a purchaser's grantee with warranty, who has not assumed the mortgage and did not know of its existence, is not subject to the same equity as the original purchaser.[7]

§ 25. **Rights of Mortgagor against Mortgagee and such a Purchaser.** — When a purchaser of mortgaged premises has assumed the payment of the mortgage-debt, the mortgagor cannot require the creditor to foreclose, but must himself, if the creditor so requires, pay his debt according to his agreement.

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[1] Conrad *v.* Mullison, 24 N. J. Eq. 65.

[2] Union Ins. Co. *v.* Hanford, 143 U. S. 187; s. c. 27 Fed. Rep. 588; Francisco *v.* Shelton, 85 Va. 779; Paine *v.* Jones, 76 N. Y. 274; s. c. 14 Hun (N. Y.), 577; Calvo *v.* Davies, 73 N. Y. 211; s. c. 8 Hun (N. Y.), 222; Marshall *v.* Davies, 78 N. Y. 414, reversing s. c., 16 Hun, 606; Bentley *v.* Vanderheyden, 35 N. Y. 677; Ayres *v.* Dixon, 78 N. Y. 318; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Flagg *v.* Thurber, 14 Barb. (N. Y.) 196; Blyer *v.* Monholland, 2 Sandf. Ch. (N. Y.) 478; Hoysradt *v.* Holland, 50 N. H. 433; Corbett *v.* Walerman, 11 Iowa, 87.

[3] Ferris *v.* Crawford, 2 Denio (N. Y.), 595; Brewer *v.* Staples, 3 Sandf. (Ch. N. Y.) 579.

[4] Woodbury *v.* Swan, 58 N. H. 380.

[5] George *v.* Andrews, 60 Md. 26; Young *v.* Hawkins, 74 Ala. 370; Knox *v.* McCain, 13 Lea (Tenn.), 197; McLean *v.* Towle, 3 Sandf. Ch. (N. Y.) 117; Wood *v.* Smith, 51 Iowa, 156.

[6] Shinn *v.* Fredericks, 56 Ills. 439.

[7] Bock *v.* Gallagher, 114 Mass. 28.

He may then proceed against the land and the purchaser thereof for his indemnity. He can also proceed in equity, to compel the purchaser, as to whom he stands in the position of a mere surety, to pay the debt for his protection.[1] But the mortgagee may, if he choose, rely upon the personal liability of his debtor;[2] his rights are not affected by the agreement between the mortgagor and the purchaser;[3] for the principal debtor cannot acquire the rights of a surety against the creditor without the latter's consent.[4] The mortgagee is not bound to look after or to protect the mortgaged premises; and if he finally forecloses the mortgage, the mortgagor is entitled to credit only for the net proceeds realized therefrom, and remains liable for any deficiency.[5] The mortgagee can enforce for his payment both the personal liability of the mortgagor, and the security of the mortgaged property;[6] equity will not, unless for special reasons, compel him to elect between his remedies.[7] The mortgagor would have been protected in payment of the debt by his right of subrogation to the mortgage, which, as between himself and his grantee, would not be extinguished by being transferred to him.[8] But he cannot be subrogated to the mortgage lien against his grantee, until the mortgagee has been fully paid.[1] And if the mortgagor has himself taken a second mortgage from his grantee, and has then assigned this for value to the first mortgagee, who took it without any knowledge of the assumption of the first mortgage by that grantee, the original mortgagor will not upon paying the first mortgage acquire any rights by subrogation prior to the lien of the second mortgage in the hands of the first mortgagee. The original mortgagor's subrogation in such a case will be only against his grantee who had assumed the first mortgage.[2]

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[1] Rubens *v.* Prindle, 44 Barb. (N. Y.) 336. See Resor *v.* McKenzie, 2 Disney (Ohio), 210.

[2] James *v.* Day, 37 Iowa, 164; Gillmann *v.* Henry, 53 Wisc. 465.

[3] Shepherd *v.* May, 115 U. S. 505; Meyer *v.* Lathrop, 10 Hun (N. Y.), 66; Waters *v.* Hubbard, 44 Conn. 340.

[4] Swire *v.* Redman, 1 Q. B. D. 536; Boardman *v.* Larrabee, 51 Conn. 39; Gay *v.* Blanchard, 32 La. Ann. 497. The contrary is held in Ireland (Maingay *v.* Lewis, Ir. Rep. 5 Com. Law, 229, overruling s. c. 3 *Id.* 495), and New York (Millerd *v.* Thorn, 56 N. Y. 402; Colgrove *v.* Tallman, 67 N. Y. 95), on the authority of Oakely *v.* Pasheller, 4 Clark & Fin. 207, and 10 Bligh, N. S. 548, which, however, was said in Swire *v.* Redman, *supra*, to have been decided on the ground that the creditor was a party to the new arrangement. See Overend *v.* Oriental Financial Corporation, L. R. 7 Ho. Lds. 348.

[5] Marshall *v.* Davies, 78 N. Y. 414; s. c. 58 How. Pr. (N. Y.) 231.

[6] Boyce *v.* Hunt, 19 La. Ann. 449.

[7] Micou *v.* Ashurst, 55 Ala. 607. See Wadsworth *v.* Lyons, 93 N. Y. 201; Wilson *v.* Bryant, 134 Mass. 291.

[8] Ely *v.* Stannard, 44 Conn. 528; Welton *v.* Hull, 50 Mo. 296; Smith *v.* Ostermeyer, 68 Ind. 432; Stillman *v.* Stillman, 21 N. J. Eq. 126.

§ 26. **Subrogation of the Mortgagor against his Grantee subject to the Mortgage.** — A conveyance of mortgaged premises by the mortgagor, subject in terms to the incumbrance, though the payment of this is not assumed by the grantee, will make the mortgaged premises, as between the mortgagor and the grantee, the primary fund for the payment of the mortgage-debt.[3] And if the mortgagee with notice of the facts releases the land after such a conveyance, he thereby releases the liability of the mortgagor.[4] A second mortgagee who has taken a conveyance of the equity of redemption in terms subject to the payment of the mortgages cannot, after paying off the notes secured by the first mortgage, maintain any action upon them against the debtors thereon;[5] his purchase of the mortgage extinguishes it and the debt it secures.[6] The land is the primary fund for the payment of the mortgage-debt in the hands of a mere assignee of the equity of redemption,[7] or a purchaser thereof who has retained the amount of the debt

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[1] Massie *v.* Wilson, 17 Iowa, 131.

[2] Knoblauch *v.* Foglesong, 38 Minn. 459.

[3] Sweetzer *v.* Jones, 35 Vt. 317; Hopkins *v.* Wolley, 81 N. Y. 77; Brewer *v.* Staples, 3 Sandf. Ch. (N. Y.) 579; Stevens *v.* Church, 41 Conn. 369; Townsend *v.* Ward, 27 Conn. 610; Scheppelman *v.* Fuerth, 87 Mo. 351; Hutchinson *v.* Wells, 67 Iowa, 430; Colby *v.* Place, 11 Nebraska, 348.

[4] Townsend Savings Bank *v.* Munson, 47 Conn. 390.

[5] Viles *v.* Moulton, 11 Vt. 470.

[6] Speer *v.* Whitefield, 10 N. J. Eq. 107; Crowley *v.* Harader, 69 Iowa, 83.

[7] Sheffy's Appeal, 97 Penn. St. 317.

if obliged to pay the incumbrance, may set it up against his grantor,[1] and the grantor's payment will not entitle him to subrogation against the grantee.[2]

§ 27. **Rights of Co-mortgagees against each other.** — Where a third mortgage was held by three, one of whom also held the first and second mortgages, and the latter began to foreclose the first mortgage, as he had a right to do,[3] the other two were allowed against him to redeem from the first and second mortgages, with the privilege, if he refused to contribute to the redemption, of holding the premises against him until he should contribute his share, being subrogated by their redemption to the same rights against him which before redemption he held against them.[4] If a mortgagor has a demand against the mortgagee, which he has a right to set off against the notes secured by the mortgage, and these notes are in the hands of different assignees, the set-off should diminish the amount to be paid to each assignee ratably;[5] and if one of them has extinguished the set-off, and the mortgaged estate is not sufficient to pay all, its proceeds should be so distributed that all shall contribute ratably to the extinguishment of the set-off, and receive ratable shares of the surplus.[6]

§ 28. **Subrogation of the Purchaser of an Equity of Redemption on his payment of a Prior Incumbrance.** — The purchasers of an equity of redemption, which was subject to the incumbrance of four different liens, the payment of which they did not assume, having paid off the first two charges and a portion of the third, were held to be subrogated by their payments to the rights of the creditors under their respective liens, to the extent to which they had paid off the same, and were allowed to set them up against the holder of the fourth charge,[1] on the principle that where one who is not personally liable for a debt secured by a mortgage or other lien is compelled to pay it in order to preserve his own property, and does pay it, he may be subrogated to the lien,[2] although it has not been assigned to him;[3] though, if he takes an assignment of it, this of course will only strengthen his position.[4] This right of subrogation will also pass to a grantee of such a purchaser.[5] And where the holder of the first incumbrance waived his claim to actual payment for the sole benefit of one holding an interest in the equity of redemption, and discharged his mortgage of record to such person without consideration, it was held that the incumbrance was not thereby extinguished as to a subsequent incumbrancer,[6] but the holder of the equity in whose favor the waiver was made was subrogated to its benefit, and could set it up as a subsisting title.[7] If a party who has the right to require an assignment of a mortgage pays the mortgage-debt, and takes a discharge of the mortgage, the mortgage may be regarded as a subsisting security for his protection; he will be subrogated to the rights of the mortgagee.[8] The rule that the payment of a mortgage-debt by the owner of the equity of redemption will extinguish the mortgage does not apply to the payment of an incumbrance which existed before the conveyance to the owner of the equity, and which the latter is under no obligation to pay.[9] If such an owner of the equity of redemption pays the debt, the mortgage is to be treated as assigned to him, if this is manifestly for his interest, and not inconsistent with the justice of the case, and if no contrary intent is clearly expressed or necessarily implied.[1] And he will be entitled to the benefit of a personal judgment already recovered against the mortgagor for the debt.[2]

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[1] Estabrook *v.* Smith, 6 Gray (Mass.), 572; Wolbert *v.* Lucas, 10 Penn. St. 73.

[2] Ruggles *v.* Barton, 16 Gray (Mass.), 151.

[3] Sanford *v.* Bulkley, 30 Conn. 344; Cronin *v.* Hazletine, 3 Allen (Mass.), 324.

[4] Saunders *v.* Frost, 5 Pick. (Mass.) 259.

[5] Kilpatrick *v.* Dye, 4 Sm. & M. (Miss.) 289.

[6] Campbell *v.* Johnston, 4 Dana (Ky.), 177.

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[1] Walker *v.* King, 45 Vt. 525. So in Ayers *v.* Adams, 82 Ind. 109.

[2] Hancock *v.* Fleming, 103 Ind. 533; Warren *v.* Hayzlett, 45 Iowa, 235.

[3] McCormick *v.* Knox, 105 U. S. 122; Watson *v.* Gardner, 119 Ills. 312; Wilson *v.* Kimball, 27 N. H. 300; Bell *v.* Woodward, 34 N. H. 90; Peet *v.* Beers, 4 Ind. 46; Watts *v.* Symes, 1 De G., Mac. & G. 240.

[4] Davis *v.* Pierce, 10 Minn. 376; Dutton *v.* Ives, 5 Mich. 515.

[5] Bell *v.* Woodward, 34 N. H. 90.

[6] Paulsen *v.* Manske, 126 Ills. 72; Wood *v.* Wood, 61 Iowa, 256.

[7] Spaulding *v.* Crane, 46 Vt. 292.

[8] Rigney *v.* Lovejoy, 13 N. H. 247, 252, *Parker, C. J.*; Drew *v.* Rust, 36 N. H. 335.

[9] Abbott *v.* Kasson, 72 Penn. St. 183; Holten *v.* Lake County, 55 Ind.

§ 29. **Rights of such a Purchaser.** — Where the purchaser from a mortgagor pays off the mortgage and has it discharged without more, equity will not subrogate him to the rights of the mortgagee against an incumbrancer whose lien is subject to the mortgage, but prior to the purchase.[3] If, however, the purchaser has paid off the mortgage in ignorance of the subsequent incumbrance, he could in spite of its discharge claim the benefit of subrogation to its lien;[4] much more, if he made his payment and took the discharge relying upon the statements of the subsequent incumbrancer that the latter held no claim upon the property.[5] One who purchases property subject to the lien of three mortgages, the first two of which he pays out of his purchase-money and has discharged, the third mortgage having been given to the indorser of certain promissory notes to secure their payment by the mortgagor so as to save the mortgagee harmless by reason of his indorsement thereof, and then takes a discharge of the third mortgage from such indorser, the mortgagee therein, cannot be subrogated to the lien of the two prior incumbrances which he has paid, against the holders of the notes which were secured by the third mortgage, although the discharge of the third mort-

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194; Knox *v.* Easton, 38 Ala. 345; Ryer *v.* Gass, 130 Mass. 227.

[1] *Ames, J.*, in Ryer *v.* Gass, *supra*, citing Hinds *v.* Ballou, 44 N. H. 619; Leavitt *v.* Pratt, 53 Maine, 147.

[2] Greenough *v.* Littler, 15 Ch. Div. 93.

[3] Guernsey *v.* Kendall, 55 Vt. 201; Bentley *v.* Whittemore, 18 N. J. Eq. 366; Garwood *v.* Eldridge, 2 N. J. Eq. (1 Green) 145; Carter *v.* Goodin, 3 Ohio St. 75.

[4] Young *v.* Morgan, 89 Ills. 199; Barnes *v.* Mott, 64 N. Y. 397; McNeil *v.* Miller, 29 W. Va. 480; Cameron *v.* Holenshade, 1 Cincin. (Ohio) 83.

[5] Bunting *v.* Gilmore, 124 Ind. 114.

of the payment which has gone to the benefit of the owner.[1] If the purchaser of an equity of redemption has paid off the mortgage-debt, but has neglected to record his deed from the mortgagor, until after a creditor of the mortgagor has attached the equity of redemption, he will be subrogated to the lien of the mortgage upon the premises, for the reimbursement to him of the amount which he has paid upon the mortgage-debt.[2] But if the attachment had been made prior to the purchase, though actually unknown to the purchaser, such purchaser, having really bought subject to the attachment, could not, after the land had been sold upon the attachment, have the sale vacated, and set up against the attachment the lien of a paramount incumbrance, which he had paid out of his purchase-money.[3] So the purchaser by parol of part of a mortgaged tract of land, who has paid off the mortgage to prevent a sale of the mortgaged estate, will be subrogated to the lien of the mortgage upon the whole tract, and to the benefit of a judgment recovered thereon.[4] The same rules will be applied to a purchaser whose money has discharged an incumbrance upon personal property.[5]

§ 31. **Purchaser under a Mortgage or Charge subrogated to its Lien.** — Purchasers of property under a valid decree in favor of creditors will be subrogated to the rights of those creditors;[6] and if the creditors had no notice of a lien upon the property and so are not bound by it, the purchasers will not be affected by such lien, though notified of its existence before their purchase.[1] If mortgaged property has been sold under a decree of foreclosure, and the sale has been confirmed by the court which ordered it, but subsequently on appeal this decree is reversed, and the mortgaged property is ordered to be again sold for the payment of the mortgage-debt, the original purchaser, if he has paid his purchase-money and it has been applied in payment of the mortgage-debt, is entitled to be subrogated to the position of the creditor,[2] and to be treated as the assignee of the mortgage, to the extent of the payment of the debt which he has thus made.[3] And if the mortgagee had himself purchased at such sale, and had accordingly entered satisfaction upon his mortgage, the mortgage would, upon the sale being subsequently set aside, be set up again and enforced in equity.[4] The purchaser at a sale made for the enforcement of a mortgage or other lien is subrogated to the rights of the original lienholder,[5] even though the proceedings were invalid and his purchase has been avoided.[6] Unless he secures a title under his purchase, the sale is treated as an equitable assignment of the mortgage to him,[7] and his grantee takes the same right.[1] If the proceeds of a sheriff's sale made upon existing mortgages have been applied in satisfaction of prior incumbrances, a subsequent mortgagee, who got nothing by reason of the insufficiency of the proceeds, cannot disregard the sale because the purchaser has failed to record his deed. Such a subsequent mortgagee would not, under any circumstances, be allowed to have the land resold without reimbursing the price of the former sale which had been applied upon the prior incumbrances.[2] But if the purchaser ought himself to have paid the debt for which the sale was made, he cannot set up any title through the prior lien, but it will be deemed to have merged.[3] And one who has purchased, not under a paramount incumbrance, but under an adverse claim, will not be subrogated to the former, merely because it was afterwards, without his privity, paid off out of his purchase-money.[4]

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[1] *Fagg, J.*, in Wade *v.* Beldmeir, 40 Mo. 486, 488, explaining Valle *v.* Fleming, 29 Mo. 152.

[2] Slocum *v.* Catlin, 22 Vt. 137.

[3] Wade *v.* Baldmeir, 40 Mo. 486.

[4] Champlin *v.* Williams, 9 Penn. St. 341.

[5] Crescent City Ice Co. *v* Stafford, 3 Woods, C. C. 94; St. Louis Mining Co. *v.* Sandeval Mining Co., 116 Ills. 170.

[6] Taylor *v.* Agricultural Association, 68 Ala. 229; Cheek *v.* Waldrum, 25 Ala. 152; Jones *v.* McKenna, 4 Lea (Tenn.), 630; Bodkin *v.* Merit, 102 Ind. 293; Watkins *v* Winings, 102 Ind. 330; Johnson *v.* Sandhoff, 30 Minn. 197; Frische *v.* Kramer, 16 Ohio, 125; Grapengether *v.* Fejervary, 9 Iowa, 163; McCammon *v.* Worrall, 11 Paige (N. Y.), 99; Raymond *v.* Holborn, 23 Wisc. 57; Jones *v.* Smith, 55 Tex. 383.

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[1] Smith *v.* Jordan, 25 Ga. 687; Shepherd *v.* Burkhalter, 13 Ga. 443; Martin *v.* Jackson, 27 Penn. St. 504; Sharp *v.* Shea, 32 N. J. Eq. 65; Case *v.* Woolley, 6 Dana (Ky.), 17.

[2] Jones *v.* McKenna, 4 Lea (Tenn.), 630; Davis *v.* Roosvelt, 53 Tex. 305.

[3] Martin *v.* Kelly, 59 Miss. 652; Wilson *v.* Brown, 82 Ind. 471; Miller *v.* Hall, 1 Bush (Ky.), 229; Crosby *v.* Farmers' Bank, 107 Mo. 436; Johnson *v.* Robertson, 34 Md. 165.

[4] Zylstra *v.* Keith, 2 Desaus. Eq. (So. Car.) 140; Stackpole *v.* Robbins, 47 Barb. (N. Y.) 212.

[5] Brobst *v.* Brock, 10 Wallace, 519; Dearnaley *v.* Chase, 136 Mass. 288; Brown *v.* Smith, 116 Mass. 108; Dutcher *v.* Hobby, 86 Ga. 198; Logansport *v.* Case, 124 Ind. 254; Shannon *v.* Hay, 106 Ind. 589; Hines *v.* Dresher, 93 Ind. 551; Ingle *v.* Culbertson, 43 Iowa, 265; Loney *v.* Courtnay, 24 Neb. 580; Merriam *v.* Rauen, 23 Neb. 217; Bonner *v.* Lessley, 61 Miss. 392; Clark *v.* Wilson, 56 Miss. 753; Gregory *v.* Bartlett, 55 Ark. 30; Turman *v.* Bell, 54 Ark. 273.

[6] Brobst *v.* Brock, 10 Wallace, 519; Sloan *v.* Sewell, 81 Ind. 180; Parker *v.* Goddard, 81 Ind. 294; Jackson *v.* Bowen, 7 Cow. (N. Y.) 13; Gilbert *v.* Cooley, Walker Ch. (Mich.) 494; Russell *v.* Hudson, 28 Kans. 99; St. Louis *v.* Priest, 103 Mo. 652; Honaker *v.* Shough, 55 Mo. 472; King *v.* Brown, 80 Tex. 276.

[7] Marimuttu *v.* De Soysa, (1891) 1 Ap. Cas. 69; Smith *v.* Robertson,

§ 32. **Rights of such a Purchaser in California.** — It was held in California, after a foreclosure sale had been avoided because the owner of the mortgaged premises had not been made a party to the foreclosure suit, that the purchaser at such sale must seek his relief from the consequences of the invalidity of the decree for the sale by proceedings in the foreclosure suit; because by his purchase he had submitted himself to the jurisdiction of the court in that suit as to all matters connected with the sale. Upon his application, the court might set the sale aside and cancel the satisfaction of the mortgage, and authorize a supplemental bill for a resale of the premises to be filed, and conducted in the names of the original complainants for the benefit of the purchaser, causing

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89 N. Y. 555; Childs *v.* Childs, 10 Ohio St. 339; Brewer *v.* Nash, 16 R. I. 458; Curtis *v.* Gooding, 99 Ind. 45; Ulrich *v.* Drischell, 88 Ind. 354; Ray *v.* Detchon, 79 Ind. 565; Wells *v.* Lincoln County, 80 Mo. 424; Rogers *v.* Benton, 39 Minn. 39; Walker *v.* Lawler, 45 Tex. 532; Wilson *v.* White, 84 Calif. 239.

[1] Osborne *v.* Taylor, 60 Conn. 107; Jellison *v.* Halloran, 44 Minn. 199; Cooke *v.* Cooper, 18 Oreg. 142.

[2] Wolf *v.* Lowry, 10 La. Ann. 272.

[3] Thompson *v.* Heywood, 129 Mass. 401. *Postea*, § 46.

[4] Waples *v.* Hays, 108 U. S. 6; Huse *v.* Den, 85 Calif. 390; Lowe *v.* Rawlins, 83 Ga. 320.

the creditor, and that since subrogation is allowed for the benefit of a purchaser of an immovable, who uses the price which he pays in paying the creditors to whom the inheritance was mortgaged,[1] this purchaser's heirs should be subrogated to the rights of the mortgagee whose debt had been paid by his purchase.[2] The same principle was applied in Michigan for the protection of one who had purchased mortgaged premises from the widow of the mortgagor, in consideration of his paying her a small sum of money and redeeming from the mortgage, and he was allowed against the mortgagor's heirs upon their avoidance of his purchase a lien upon the land for the amount which he had paid to redeem it with interest, less the value of the use and occupation which he had enjoyed.[3]

§ 34. **Purchaser ordinarily subrogated to all the Rights of his Vendor.** — A purchaser will ordinarily be subrogated to all the rights of his vendor in the property, even though they are not expressly conveyed to him.[4] Though he had notice of outstanding equities, he will not be bound by them, if his grantor could have defended against them as a *bona fide* purchaser without notice.[5] Thus, one who holds property in pledge has a special property which may be sold or assigned; and his assignee will be subrogated to the rights of the original pledgee.[6] The assignee of one who has agreed to sell land is subrogated to his vendor's right of rescission.[7] So, one who has in good faith and for a valuable consideration purchased the whole or a portion of a mortgaged estate from the mortgagee in possession will be regarded as the equitable assignee of the mortgage to the extent of his purchase-money, both against the mortgagor seeking to redeem the estate,[1] and against parties interested in the estate by subsequent conveyances.[2] The vendee of one who holds a bond for title to land acquires by his purchase all the interest of his vendor, that is, the right to require a conveyance from the owner of the land upon payment of the price stipulated in the bond;[3] and the owner of the land and the holder of the bond, having notice of his rights, cannot rescind their contract so as to deprive him of this equity.[4] The assignee of one who held a contract for the purchase of land will be subrogated to the equitable lien of his assignor upon the land for the return of a portion of the purchase-money which he had advanced, upon the contract failing through the default or the inability of the vendor.[5] Such an assignee may also, upon making full payment of the price, be subrogated to the rights of the original vendor against the original purchaser.[6] The assignee of a debt will take as an incident the equitable right[7] to the collateral obligation of a third person,[8] or to any collateral security held by the original creditor for its payment,[9] even though a formal assignment has not been made.[1] A maritime lien will pass to an assignee of the debt secured thereby.[2] The claim of a vendee of land for a defect in the title, a conveyance not yet having been made, will pass to his grantee. Thus, where the purchaser at a judicial sale of land paid a part of the purchase-money, and then, before taking a conveyance, sold his claim under his purchase to an assignee, who paid the residue of the price, and then a defect in the title was discovered, whereby the sale was avoided, this assignee was held to be entitled to have the whole amount that had been paid refunded to him, including the payment made by his grantor as well as what he had himself paid.[3] If the purchaser of real property at an execution-sale before taking his deed accepts from a stranger the amount on payment of which the judgment-debtor would have been entitled to redeem, and assigns to him the certificate of the sale, the stranger is thereby subrogated to the rights of such purchaser and entitled to a deed of the property.[4]

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[1] *Antea*, § 5.

[2] Muir *v.* Berkshire, 52 Ind. 149.

[3] Webb *v.* Williams, Walker (Mich.), 544.

[4] Chicago *v.* Tebbetts, 104 U. S. 120; McKeage *v.* Hanover Ins. Co., 81 N. Y. 39; Sickles *v.* Flanagan, 79 N. Y. 224; Thompson *v.* Kenyon, 100 Mass. 108; Ruggles *v.* Barton, 13 Gray (Mass.), 506; Murdock *v.* Chapman, 9 Gray (Mass.), 156; Butler *v.* Barnes, 60 Conn. 170; Loomis *v.* Knox, 60 Conn. 343; Murphy *v.* Adams, 71 Maine, 113; Logan *v.* Taylor, 20 Iowa, 297; Kemp *v.* Kemp, 85 Nor. Car. 491; Pettit *v.* Black, 8 Neb. 52; Stanton *v.* Quinan, 91 Calif. 1; Creanor *v.* Creanor, 36 Ark. 91; Heinlen *v.* Martin, 53 Calif. 321; Peters *v.* Clements, 52 Tex. 140.

[5] Brown *v.* Cody, 115 Ind. 484; Drey *v.* Doyle, 99 Mo. 459.

[6] Talty *v.* Freedmens' Savings Co., 93 U. S. 321; Merchants' Bank *v.* State Bank, 10 Wall. 604; Lewis *v.* Mott, 36 N. Y. 395; Donald *v.* Suckling, L. R. 1 Q. B. 585.

[7] Castle *v.* Floyd, 38 La. An. 583.

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[1] McSorley *v.* Larissa, 100 Mass. 270; Ruggles *v.* Barton, 13 Gray (Mass), 506; Grover *v.* Thatcher, 4 Gray (Mass.), 526; Wyman *v.* Hooper, 2 Gray (Mass.), 141; Raymond *v.* Raymond, 7 Cush. (Mass.) 605.

[2] Smith *v.* Hitchcock, 130 Mass. 570.

[3] Graves *v.* Graves, 6 Gray (Mass.), 391; Fulcher *v.* Daniel, 80 Ga. 74; Shaw *v.* Foster, L. R. 5 Ho. Lds. 321.

[4] Shaver *v.* Shoemaker, Phillips Eq. (Nor. Car.) 327; Chickering *v.* Fullerton, 90 Ills. 520.

[5] Tompkins *v.* Seeley, 29 Barb. (N. Y.) 212.

[6] Dillow *v.* Warfel, 71 Iowa, 106.

[7] Not always the legal right: Batchelder *v.* Jenness, 59 Vt. 104.

[8] Lahmers *v.* Schmidt, 35 Minn. 434.

[9] Payne *v.* Wilson, 74 N. Y. 348; Cooper *v.* Newland, 17 Abb. Pr. (N. Y.) 342; Hagemann's Appeal, 88 Penn. St. 21; Cathcart's Appeal, 13 Penn. St. 416; Fitzsimmon's Appeal, 4 Penn. St. 248; Miller *v.* Hoyle, 6 Ired. Eq. (Nor. Car.) 269; Waller *v.* Tate, 4 B. Mon. (Ky.) 529; Strother

§ 35. **Where the Purchaser pays Debts with which the Property was chargeable.** — The purchaser of land who pays off a lien upon it may be subrogated to the rights of the holder of the lien as against another incumbrancer, such purchaser not having assumed either of the debts.[5] He has even been subrogated to an interest in the prior incumbrance upon making only a partial payment thereof.[6] The purchaser from a devi-

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v. Hamburg, 11 Iowa, 59; State *v.* Hoshaw, 98 Mo. 358; Taylor *v.* Nelson, 54 Miss. 524; Hurt *v.* Wilson, 38 Calif. 263; Skyrme *v.* Occidental Mill Co., 8 Nevada, 219; Rogers *v.* Omaha Hotel Co., 4 Nebraska, 54. *Postea*, § 185.

[1] Mohle *v.* Tschirch, 63 Calif. 381; Wilson *v.* Boden, 26 Ark. 151.

[2] The American Eagle, 19 Fed. Rep. 879; The Pride of America, 19 Id. 607; The Sarah J. Weed, 2 Lowell, 555.

[3] Smith *v.* Brittain, 3 Ired. Eq. (Nor. Car) 347.

[4] Eleventh Avenue, *in re*, 81 N Y. 436.

[5] Pierce, *in re*, 2 Lowell, 343; Stevens *v.* King, 84 Maine, 291; Johnson *v.* Parmely, 14 Hun (N. Y.), 398; Robenson *v.* Urquhart, 12 N. J. Eq. 515; Dircks *v.* Logsdon, 59 Md. 173; Sidener *v.* Hawes, 37 Ohio St. 532; Bressler *v.* Martin, 133 Ills. 278; Planters' Bank *v.* Dodson, 9 Sm. & M. (Miss.) 527.

[6] Simpson *v.* Del Hoyo, 94 N. Y. 189.

the purchaser has been preferred to the claim of a surety of the vendor for the debt which constituted the charge upon the land to be subrogated, upon his payment of the debt, to the security which was held by the creditor.[1] A purchaser whose land has been taken upon an execution against his vendor is entitled, upon paying the debt, to be subrogated to the lien of the judgment against the remaining land of his vendor.[2] If, however, he has paid for the land by giving bonds for its price, which are still unpaid, he may set off his payment against these bonds, even though they are in the hands of one to whom they have been assigned by the vendor;[3] so, too, he may set off such a payment against notes which he has given for the price of the land, while these notes are still retained by the vendor, even though the notes are by statute exempted from levy in the hands of the vendor, like a homestead estate.[4] But this set-off of such a payment by the purchaser against bonds given by him for the price of the land must be made first upon bonds which are retained by the vendor, before applying it upon those bonds which have been assigned by him; and if the purchaser, with knowledge of the assignment of some of the bonds and with notice of the prior lien upon his land, pays the unassigned bonds to the amount of the lien, the assigned bonds will be thereby relieved from all liability on account of the lien.[5]

§ 36 *a*. **Purchaser's Subrogation does not depend upon the Validity of his Title.** — The right of subrogation does not depend upon the validity of the title of the person claiming to be reimbursed for his payment in discharge of a valid incumbrance.[6] It is merely necessary that his payment should

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Shelby *v.* Marshall, 1 Blackf. (Ind.) 384; Galliher *v.* Galliher, 10 Lea (Tenn.), 23; Hurt *v.* Reeves, 5 Hayw. (Tenn.) 50.

[1] Rush *v.* State, 20 Ind. 432; Armstrong *v.* Fearnaw, 67 Ind. 429.

[2] Beall *v.* Walker, 26 W. Va. 472; McGill, *in re*, 6 Penn. St. 504.

[3] Armentrout *v.* Gibbons, 30 Gratt. (Va.) 632; McGill, *in re*, 6 Penn. St. 504.

[4] Corbally *v.* Hughes, 59 Ga. 493.

[5] Armentrout *v.* Gibbons, 30 Gratt. (Va.) 632.

[6] Bright *v.* Boyd, 1 Story, 478; Fowler *v.* Parsons, 143 Mass. 401;

have been made in good faith for the protection of an interest which he believed himself to have in the estate, and in discharge of a burden actually resting upon the property,[1] so that his payment has increased the value of the estate for the benefit of those who turn out subsequently to be entitled to the title.[2] The benefit of subrogation has accordingly been allowed to one who held merely an invalid or a verbal contract for the conveyance of the land which he has freed from an incumbrance;[3] to the assignee of one who held such a contract;[4] to one whose only title was under an invalid mortgage,[5] or under a voidable decree;[6] to one who claimed only under a void or a voidable sale,[7] even after the avoidance of the sale by order of court;[8] to an unsecured creditor who has paid off a mortgage-debt in compliance with an erroneous order of court;[9] to a devisee who has only a contingent remainder in the encumbered estate,[10] and to one who holds merely an equitable lien upon the property.[11] If he *bona fide* claims an interest, he is not a mere volunteer, and may be subrogated;[12] but he must show that he had or supposed he had some interest to be protected.[13]

Sunders *v.* Sanders, 2 Dev. Eq. (Nor. Car.) 262; Scott *v.* Dunn, 1 Dev. & Bat. Eq. (Nor. Car.) 425, 427; Gerdine *v.* Menage, 41 Minn. 417.

[1] Guckian *v.* Riley, 135 Mass. 71; Kelly *v.* Duff, 61 N. H. 435; Benedict *v.* Chase, 58 Conn. 196; *Thompson, C. J.*, in Mosier's Appeal, 56 Penn. St. 76, and cases there cited.

[2] Weimer *v.* Porter, 42 Mich. 569; Ingersoll *v.* Jeffords, 55 Miss. 37; Blodgett *v.* Hitt, 29 Wisc. 169, 182 *et seq.*; Wright *v.* Oroville Mining Co., 40 Calif. 20.

[3] Champlin *v.* Williams, 9 Penn. St. 341; Stewart *v.* Fellows, 128 Ills. 480; Dillow *v.* Warfell, 71 Iowa, 106.

[4] Tompkins *v.* Seely, 29 Barb. (N. Y.) 212; Sheen *v.* Hogan, 86 Ills. 16; Fisher *v.* Johnson, 5 Ind. 492.

[5] Brooke *v.* Bordner, 125 Penn. St. 470; Spaulding *v.* Harvey, 129 Ind. 106; Lamb *v.* West, 75 Iowa, 399; Gilbert *v.* Gilbert, 39 Iowa, 657; Davis *v.* Roosvelt, 53 Tex. 305.

[6] Coudert *v.* Coudert, 43 N. J. Eq. 407.

[7] Hutson *v.* Sadler, 31 W. Va. 358; Muir *v.* Berkshire, 52 Ind. 149; Payne *v.* Hathaway, 3 Vt. 212.

[8] Johnson *v.* Robertson, 34 Md. 165. *Antea*, § 31. *Postea*, § 209.

[9] Magill *v.* De Witt County Bank, 126 Ills. 244.

[10] Pease *v.* Eagan, 131 N. Y. 262.

[11] Hackensack Savings Bank *v.* Terhune Manufacturing Co., 45 N. J. Eq. 610.

[12] Harlan *v.* Jones, 104 Ind. 167; Kelly *v.* Duff, 61 N. H. 435; James *v.* Burbridge, 33 W. Va. 272; Arn *v.* Hoppin, 25 Kans. 707.

[13] Wadsworth *v.* Blake, 43 Minn. 509.

§ 37. **Limitation of Purchaser's Right of Subrogation.** — A grantee's cause of action against his grantor for any misrepresentation is personal, and does not pass to any subsequent purchaser from the grantee.[1] The subrogation of the purchaser will not ordinarily extend to a mere right of action which has already become vested in his grantor,[2] such as an action for a deficiency in the quantity of the land which would have entitled the vendor to an action against the original owner for such deficiency. An express or conventional subrogation is necessary to vest this right of the vendor in his purchaser.[3] Nor will one claiming under a quitclaim deed from a mortgagor be thereby subrogated to the mortgagor's right to defend against the mortgage on the ground that it was procured by the fraud of the mortgagee.[4] Nor will the purchaser be subrogated to any right of his vendor of which the law forbids the conveyance,[5] or which is excluded by necessary implication from the terms of the conveyance under which he claims.[6] Where the vendor of land had a lien thereon for the price, which was superior to a mortgage subsequently given by the vendee, but sold the vendee's interest in the property, instead of the property itself, for the unpaid balance of the price, the purchaser of the vendee's interest at this sale was not allowed to prevent a foreclosure of the mortgage on the ground that he was by his purchase from the vendor subrogated to the vendor's equitable lien.[7] The purchaser of the right to redeem from two mortgages or other liens, since he acquires only the interest of the mortgagor,

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[1] Livingston *v.* Peru Iron Co., 2 Paige (N. Y.), 390; Collins *v.* Suau, 7 Robt. (N. Y.) 623; Lawrence *v.* Montgomery, 37 Calif. 183.

[2] Willoughby *v.* Middlesex Co., 8 Met. (Mass.) 296.

[3] Chambliss *v.* Miller, 15 La. Ann. 713; Davis *v.* Clark, 33 N. J. Eq. 579.

[4] Fairfield *v.* McArthur, 15 Gray (Mass.), 526; Bradshaw *v.* House, 43 Tex. 143.

[5] Mason *v.* Mason, 140 Mass. 63.

[6] True *v.* Congdon, 44 N. H. 48; Warren *v.* Coggswell, 10 Gray (Mass.), 76; Kendall *v.* Brown, 7 Gray (Mass.), 210; Squier *v.* Shepard, 38 N. J. Eq. 331; Adams *v.* Friedlander, 37 La. Ann. 350.

[7] Allen *v.* Phelps, 4 Calif. 256.

upon the execution, but afterwards the debtor, discovering the mistake, regained the land, and refused to refund the purchase-money, the purchaser was allowed to recover the amount of the purchase-money from him.[1] The purchaser at an execution-sale of property which is under attachment for the same debt is entitled, if it is afterwards subjected by a decree to the payment of the attachment, to be reimbursed out of the proceeds of the attached property for his payment upon the execution.[2] And if the purchaser of attached property pays the price in discharge of liens which were superior to the attachment, he should be indemnified, if the property is afterwards decreed to be sold upon the attachment, by the reimbursement of his money in preference to the attaching creditor.[3] So, also, if an execution-creditor takes from his debtor an assignment of the latter's interest in a personal estate, this assignment is valid to the amount of his demand; and if this creditor, to save his rights, afterwards purchases the same property from a sheriff, who sells it upon a subsequent levy made under executions senior to his own, though this latter sale is void, the creditor so purchasing will be allowed, as against the debtor, to stand in the place of the senior creditors whom he has thus satisfied, and to be subrogated to their rights.[4] And generally where an execution-sale upon a valid judgment is voidable, and the debtor seeks to recover the property, if there be no fraud on the part of the purchaser, the latter will not be compelled to restore the property to the debtor without being reimbursed the amount which he paid, and which has gone to discharge the judgment-lien.[5] And in the same way the purchaser from a judgment-debtor of property which has been sold on execution will be subrogated to whatever right of redemption the debtor has by agreement acquired in the premises.[1]

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[1] McLean *v.* Martin, 45 Missouri, 393.

[2] Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

[3] Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

[4] Bentley *v.* Long, 1 Strobh. Eq. (So. Car.) 43.

[5] Stone *v.* Darnell, 25 Tex. Sup. 430; Andrews *v.* Richardson, 21 Tex. 287; Morton *v.* Welborn, 21 Tex. 772; Howard *v.* North, 5 Tex. 290

§ 39. **Subrogation of such Purchaser where the Property recovered by Third Parties.** — It has been considered that the purchaser of property sold under an execution has the right in equity, if the property has been recovered from him or his vendor by another under a superior title, to be substituted for the judgment-creditor to the original judgment-lien, and to have the amount of his purchase-money refunded to him by the defendant in the execution,[2] even though he knew at the time of his purchase that the property belonged to another, and was not liable to be sold on the execution;[3] and that if the property had been thus recovered from a vendee of the purchaser, the purchaser, in his suit for indemnity, need not show that he has reimbursed his vendee, to whom he only, and not the defendant in the execution is liable.[4] But this has also been strenuously denied, and the position maintained, with greater reason, that the purchaser at an execution-sale is not subrogated to the rights of the judgment-creditor against the debtor, if the property is afterwards taken from him by virtue of a paramount title in a stranger,[5] just as he cannot under the same circumstances recover back the amount of his purchase-money from the creditor to whom it has been paid;[6]

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[1] Dupuy *v.* McMillan, 2 Duvall (Ky.), 555.

[2] Julian *v.* Beal, 26 Ind. 220; Muir *v.* Craig, 3 Blackf. (Ind.) 293; Geoghegan *v.* Ditto, 2 Met. (Ky.) 433; Price *v.* Boyd, 1 Dana (Ky.), 434; McGhee *v.* Ellis, 4 Litt. (Ky.) 244.

[3] McLaughlin *v.* McDaniel, 8 Dana (Ky.), 182; *semble*, in Howard *v.* North, 5 Tex. 290, 315.

[4] McLaughlin *v.* McDaniel, 8 Dana (Ky.), 182.

[5] Hawkins *v.* Miller, 26 Ind. 173; Vattier *v.* Lytle, 6 Ohio, 477, 478; Parry *v.* Williams, Dudley (So. Car.), 44; Halcombe *v.* Loudermilk, 3 Jones Law (Nor. Car.), 491; Goodbar *v.* Daniel, 88 Ala. 583.

[6] Georgetown *v.* Smith, 4 Cranch, C. C. 91; Patterson's Estate, 25 Penn. St. 71; Lall *v.* Matthews, 19 Vt. 322; Leport *v.* Todd, 32 N. J. Law, 124; Martin *v.* Martin, 7 Md. 368; Spott *v.* Commonwealth, 85 Va. 531; Rollins *v.* Henry, 78 Nor. Car. 342; Andrews *v.* Murphy, 12 Ga. 431; Anderson *v.* West, 80 Ky. 171; Bunch *v.* Grave, 111 Ind. 351; Conner *v.* Wells, 91 Ind. 197; Burden *v.* Johnson, 81 Mo. 318; Nugent *v.* Priebatsch, 61 Miss. 402; Goodbar *v.*

and this on the ground that he is merely a voluntary purchaser of the debtor's interest in the property, and that it is only where the person paying a debt has the rights of a surety, or is compelled to pay it by legal process, or in order to save his own property, that equity substitutes him, even against the debtor, to the place of the creditor; and that a mere stranger or volunteer paying the debt will not be subrogated to the rights of the creditor, unless there has been an assignment to him or an express agreement for such subrogation.[1]

§ 40. **Rights of a Purchaser whose Purchase is voidable by the Creditors of his Vendor.** — One who has purchased property at a sale which may be avoided by the creditors of the vendor, whether he is an assignee for the benefit of creditors, a purchaser, or a voluntary grantee, will, after satisfying the claims of the attaching creditors, be subrogated to their rights, so as to enable him to hold the property against subsequent attachments.[2] His purchase at a sheriff's sale against his grantor will give him a good title.[3] And if the sale to him was good as against the vendor, so that he could require the vendor himself to discharge the debts for which the property was subsequently attached, he may, in New York, upon paying the judgment rendered under such attachment, take an assignment of the judgment against his vendor and be subrogated to the rights of the judgment-creditor against his vendor.[4] If a grantee of land whose deed is voidable by the creditors of his grantor takes from a prior mortgagee of the property a quitclaim deed of all the latter's interest in the premises, though it expressly states that the mortgage is thereby cancelled and discharged, this will, if his grant is avoided by the grantor's creditors, be construed against them to operate as

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Dun, *Id.* 618; Stevens *v.* King, 21 Ala. 429; Fore *v.* Manlove, 18 Calif. 436.

[1] Richmond *v.* Marston, 15 Ind. 134; Childress *v.* Allen, 3 La. 477.

[2] Selleck *v.* Phelps, 11 Wisc. 380; Lamb *v.* Smith, 132 Mass. 574.

[3] Arrington *v.* Arrington, 102 Nor. Car. 491.

[4] Cole *v.* Malcolm, 66 N. Y. 363.

to a common lien paid off the whole debt and took an assignment of the mortgage, it was held that he might either regard the mortgage as discharged, and bring an action against the other for contribution, or treat it as a subsisting charge upon the estate until the other should redeem by paying a reasonable contribution.[1] Certain mortgaged premises being subject to a paramount lien for taxes, the first mortgagee, before foreclosure, paid the same, under an agreement with the second mortgagee that the latter, if he purchased the premises at the foreclosure-sale, should repay the amount. The second mortgagee did so purchase; and the estate was conveyed to him. He then refused to refund the taxes; and it was held that the first mortgagee could not now, after his conveyance, be subrogated to the original tax lien.[2] Though in general a junior incumbrancer who pays off the holder of a prior lien is entitled to be subrogated to the benefit of the latter's security, yet this right will be waived by an agreement of the junior incumbrancer that the property shall be otherwise appropriated.[3] A long delay without action will be fatal to a claim of subrogation.[4]

§ 42. **What is not a Waiver.** — The right of subrogation to a recorded mortgage will not be lost by the mere failure to give notice of the claim to a purchaser for value.[5] The fact that one entitled to subrogation obtains also collateral security for his protection is not of itself a waiver of his right.[6] A mortgagee who is entitled to be subrogated to the benefit of a prior lien, which he has discharged, will not be deprived of this right, even though he has taken a new mortgage upon the

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So. Car. 301; Belcher *v.* Wickersham, 9 Baxter (Tenn.), 111. *Postea,* §§ 110, 147.

[1] Taylor *v.* Bassett, 3 N. H. 294.

[2] Manning *v.* Tuthill, 30 N. J. Eq. 29.

[3] United States Bank *v.* Peters, 13 Peters, 123.

[4] West's Appeal, 88 Penn. St. 341; Fleming *v.* Parry, 24 Penn. St. 47; Buffington *v.* Bernard, 90 Penn. St. 63.

[5] Hurt *v.* Riffle, 11 Fed. Rep. 790.

[6] Smith *v.* Dinsmoor, 119 Ill. 656.

same premises for the amount of his payments,[1] and this new mortgage has been afterwards avoided for usury.[2] But it is to be observed that this agreement for usury was not made until after the right of subrogation had vested;[3] if, however, the claim had grown out of the usurious agreement, instead of being prior to it and independent of it, it could have furnished no basis for subrogation.[4] Where one who was in treaty for the purchase of personal property, which was subject to two mortgages, paid off the first mortgage, under an agreement that until the completion of the sale he should stand in the place of the mortgagee and have the benefit of his security, it was held that he was not deprived of this conventional subrogation by the fact that his agreement with his vendor contained a recital that the amount so paid by him had been paid by him out of the purchase-money and in discharge of the mortgage-debt.[5]

§ 43. **Right lost by Negligence resulting in Prejudice to others.** — The fact that the loss of one who seeks to be protected by the application of the doctrine of subrogation arose from his own negligence, and that the granting of his request would now be prejudicial to other innocent creditors or assignees of his debtor, will be fatal to his claim.[6] Thus, where the owner of land conveyed it to another, and took for the purchase-money a mortgage upon the property, and the parties agreed that the deeds should remain unrecorded until the land should be surveyed, and the mortgagor stated to the mortgagee that he intended to sell the land to one D., and promised to transfer D.'s mortgage instead of his own, to which arrangement the mortgagee assented, and the mortgagor did convey to D., who recorded his deed without notice of the prior mortgage, which was not recorded until after the conveyance to D., it was held that the original mortgagee was not entitled to the benefit of the mortgage given by D., in preference to the other creditors of his debtor's insolvent estate.[1] And where a grantor sold land, taking no security for the payment of the purchase-money, and his grantee sold the land to another, and took divers bonds for the purchase-money, it was held that although the original grantor, by virtue of his equitable lien upon the land, might have subjected these bonds to the payment of his claim while they were in the hands of his grantee, yet he lost this right by delaying to enforce it until after the bonds had been assigned to *bona fide* holders for value without notice of his claim.[2] But the mere fact that the loss of the party seeking to be subrogated arose from his own negligence will not debar him from the right, unless its enforcement would be prejudicial to others who are not at fault.[3]

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[1] Worcester Bank *v.* Cheeney, 87 Ills. 602; Burchard *v.* Phillips, 11 Paige (N. Y.), 66; Eagle Ins. Co. *v.* Pell, 2 Edw. Ch. (N. Y.) 631.

[2] Patterson *v.* Birdsall, 64 N. Y. 294; affirming s. c. 6 Hun (N. Y.), 632; McWilliams *v.* Bones, 84 Ga. 203.

[3] See Giveans *v.* McMurtry, 16 N J. Eq. 468.

[4] Perkins *v.* Hall, 105 N. Y. 539; Baldwin *v.* Moffett, 94 N. Y. 82, and 26 Hun, 209; Farmers' Loan Co. *v.* Carroll, 5 Barb. (N. Y.) 613, *per Welles, J.*; Trible *v.* Nichols, 53 Ark. 271; *postea*, § 44.

[5] Watts *v.* Symes, 1 De G., M. & G. 240.

[6] The Superior, 5 Sawyer, 346; Printup *v.* Barrett, 46 Ga. 407; Gordon *v.* English, 3 Lea (Tenn.), 634; State *v.* Bèal, 88 Ind. 106; Conner *v.* Welch, 51 Wisc. 431; Schaller, *in re*, 10 Daly (N. Y.), 57.

§ 44. **The Party seeking Subrogation must not be in his own Wrong.** — Any one who seeks the benefit of the equitable doctrine of subrogation must come into court with clean hands.[4] It will not be applied to relieve a vendee from the consequences of his own wrongful act, or of a wrongful act in which he has participated,[5] or of the wrongful act of one under whom he claims.[6] Accordingly, a vendor who seeks to re-

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[1] Bussey *v.* Page, 13 Maine, 459.

[2] Moore *v.* Holcombe, 3 Leigh (Va.), 597. *Antea*, § 40.

[3] Willcox *v.* Foster, 132 Mass. 320; Wall *v.* Mason, 102 Mass. 313; Daniel *v.* Baxter, 1 Lea (Tenn.), 630.

[4] Wilkinson *v.* Babbitt, 4 Dillon, C. C. 207; Railroad Co. *v.* Soutter, 13 Wallace, 517; Griffith *v.* Townley, 69 Mo. 13; Farmers' Loan Co. *v.* Carroll, 5 Barb. (N. Y.) 613; Johnson *v.* Moore, 33 Kans. 90.

[5] Rowley *v.* Towsley, 53 Mich. 329; Spratt *v.* Pierson, 4 So. Car. 301; Johnson *v.* Moore, 33 Kans. 90; Devine *v.* Harkness, 117 Ills. 145.

[6] Boyer *v.* Bolender, 129 Penn. St. 324; Wilson *v.* Murray, 90 Ind. 477.

titled to be subrogated thereto.[1] But the mere right of redemption and of subrogation will not of itself entitle a party to require an assignment, although this has been maintained in some cases.[2] The right to demand an assignment is now generally limited to cases in which the party who is entitled to redeem, and thereupon to be subrogated to the benefit of the lien from which he redeems, is also in effect a surety, or is in equity to be regarded as a surety, for the payment of the debt secured thereby.[3] "Any one having a subsequent incumbrance upon the mortgaged estate can protect his interest by paying the prior mortgage when it is due; and he thereupon succeeds by subrogation, upon settled principles of equity, to the rights and interest of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or transfer by the prior mortgagee. He is not entitled to an assignment."[4] Where one is entitled to an assignment of a prior mortgage, he must actually tender the full amount of principal, interest, and any accrued costs to the mortgagee; merely saying what he will do and paying the money into court will not stop the running of interest on the mortgage-debt.[5] And the right of any parties junior in interest to compel the assignment to them of a prior mortgage has been utterly denied.[1] "The mortgagee," says Mr. Justice Colt, "is not required to observe or to regard the equitable rights to contribution which may exist between parties having different interests in the equity, or to protect them by transferring his title to any one.[2] When such rights exist, they are protected on those settled principles of equity by which one who assumes more than his share of the common burden is subrogated to the rights of the mortgagee, to hold, without any assignment or act of transfer, as *quasi* assignee, for the purpose of compelling contribution. He becomes in effect the assignee of the mortgage, for the purpose of enabling him to compel a contribution. But the right of subrogation arises by operation of law only when there has been a payment and extinguishment of the mortgage by one entitled to redeem.[3] An assignment implies the continued existence of the debt, and the equitable right does not arise."[4]

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[1] Twombly *v.* Cassidy, 82 N. Y. 155; Clark *v.* Mackin, 95 N. Y. 346; Platt *v.* Brick, 35 Hun (N. Y.), 121; Knoblauch *v.* Fogelsong, 37 Minn. 320; Johnson *v.* Zink, 52 Barb. (N. Y.) 396; s. c. on appeal, 51 N. Y. 333; Mount *v.* Suydam, 4 Sandford Ch. (N. Y.) 399; Lyons' Appeal, 61 Penn. St. 15; Raffety *v.* King, 1 Keene, 601. And see Cilley *v.* Hare, 40 N. H. 358.

[2] Forest Oil Co.'s Appeal, 118 Penn. St. 138; *Sutherland, J.*, in Ellsworth *v.* Lockwood, 42 N. Y. 89, 97, citing and criticising Pardee *v.* Van Anken, 3 Barb. (N. Y.) 536, 537, and Jenkins *v.* Continental Ins. Co., 12 How. Pr. (N. Y.) 66.

[3] Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Nelson *v.* Loder, 132 N. Y. 288; Speiglemeyer *v.* Crawford, 6 Paige (N. Y.), 254, 257; Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 618; Averill *v.* Taylor, 8 N. Y. 44; Johnson *v.* Zink, 52 Barb. (N. Y.) 396; s. c. on appeal, 51 N. Y. 333; Vandercook *v.* Cohoes Savings Institution, 5 Hun (N. Y.), 641; Ellsworth *v.* Lockwood, 42 N. Y. 89; Holland *v.* Citizens' Savings Bank, 16 R. I. 734.

[4] Jones on Mortgages, § 792, citing Ellsworth *v.* Lockwood, 42 N. Y. 89, 96; Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35; Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402.

[5] Hornby *v.* Cramer, 12 How. Pr. (N. Y.) 490.

§ 46. **The Real Debtor cannot be subrogated.** — The debtor upon whom rests the ultimate obligation of discharging the debt cannot by his payment acquire any right of subrogation;[5] and if, upon making his payment, he takes an assignment of the security, this will be equivalent to a discharge thereof.[6] One whose duty it is to pay the taxes upon real estate cannot obtain any title in himself by neglecting to pay them, and either buying the property himself at the tax sale or afterwards purchasing it from a third party who had bought at such sale.[1] An assignment of a judgment to one primarily bound to pay it will not keep it alive.[2] One who has given two mortgages upon the same land with warranty cannot, after the titles under the two mortgages have been united in one person and the second mortgage has been foreclosed, redeem from the first mortgage and claim to be an equitable assignee thereof, and to be subrogated to the rights of the first mortgagee, so as to enable him to open the foreclosure of the second mortgage;[3] for no debtor can be subrogated against his own warranty,[4] nor can he be subrogated to the rights of the second against the first mortgagee.[5] A purchaser cannot be subrogated to the benefit of an incumbrance which he has agreed to pay.[6] One who has assumed and agreed to pay two incumbrances cannot be subrogated to the lien of the second,[7] and his agent who made the bargain, and so knows its provisions, is under the same disability.[8] If he himself held the first mortgage, that is extinguished by his assumption of both burdens.[9] So, if the purchaser of land

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[1] Chedel *v.* Millard, 13 R. I. 461; Butler *v.* Taylor, 5 Gray (Mass.), 455; Lamson *v.* Drake, 105 Mass. 564; Lamb *v.* Montague, 112 Mass. 352.

[2] So in Chase *v.* Williams, 74 Mo. 429; Davis *v.* Flagg, 35 N. J. Eq. 491.

[3] See *antea*, § 6.

[4] Lamb *v.* Montague, 112 Mass. 353.

[5] Underwood *v.* Metropolitan Bank, 144 U. S. 669; Thompson *v.* Heywood, 129 Mass. 401; Walsh *v.* Wilson, 130 Mass. 124; Acer *v.* Hotchkiss, 97 N. Y. 395; N. Y. Ins. Co. *v.* Vanderbilt, 12 Abbott Pr. (N. Y.) 458; Frye *v.* Bank of Illinois, 11 Ills. 367; Atkins *v.* Emison, 10 Bush (Ky.), 9; Hardin, *ex parte*, 34 So. Car. 377; Hardin *v.* Clark, 32 So. Car. 480; Davis *v.* Townsend, Id. 112; People's Bank *v.* Ballowe, 34 La. Ann. 565.

[6] Loverin *v.* Humboldt Safe De-

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posit Co., 113 Penn. St. 6; Keim *v.* Robeson, 23 Penn. St. 456; Clay *v.* Banks, 71 Ga. 363; Carlton *v.* Jackson, 121 Mass. 592; Hooper *v.* Henry, 31 Minn. 264; McCarty *v.* Christie, 13 Calif. 79.

[1] Barnard *v.* Wilson, 74 Calif. 512; Barrett *v.* Amerein, 36 Calif. 322; Busch *v.* Huston, 75 Ills. 343; Choteau *v.* Jones, 11 Ills. 300; Medley *v.* Elliott, 62 Ills. 532; Burchard *v.* Frazer, 23 Mich. 224; Cooley *v.* Waterman, 16 Mich. 366; Gaskins *v.* Blake, 27 Miss. 675; Smith *v.* Lewis, 20 Wisc. 350; Bassett *v.* Welch, 22 Wisc. 175; Fallas *v.* Pierce, 30 Wisc. 443; Fair *v.* Brown, 40 Iowa, 209; Porter *v.* Lafferty, 33 Iowa, 254; Allison *v.* Armstrong, 28 Minn. 276; Williamson *v.* Russell, 18 W. Va. 612; Franks *v.* Morris, 9 W. Va. 664; Magner *v.* Hibernia Ins. Co., 30 La. Ann., part II., 1357.

[2] Montgomery *v.* Vickery, 110 Ind. 211.

[3] Butler *v.* Seward, 10 Allen (Mass.), 466.

[4] Sparhawk *v.* Bagg, 16 Gray (Mass.), 583.

[5] McIntier *v.* Shaw, 6 Allen (Mass.), 83.

[6] Bolton *v.* Lambert, 72 Iowa, 483; Goodyear *v.* Goodyear, *Id.* 329; Probstfied *v.* Czizek, 37 Minn. 420; Martin *v.* Aultman, 80 Wisc. 150; Sharp *v.* Collins, 74 Mo. 266; Converse *v.* Cook, 8 Vt. 164; Willson *v.* Burton, 52 Vt. 394; Munroe *v.* Crouse, 59 Hun (N. Y.), 248; Tompkins *v.* Halstead, 21 Wisc. 118.

[7] Stiger *v.* Mahone, 24 N. J. Eq. 426; Willson *v.* Burton, 52 Vt. 394.

[8] Dargan *v.* McSween, 33 So. Car. 324, 325.

[9] Kneeland *v.* Moore, 138 Mass. 198.

benefit of his grantee with warranty, and the assignment is tantamount to a discharge.[1] So, if a purchaser of mortgaged premises who has by his deed assumed payment of the mortgage-debt, or the grantee of such a purchaser,[2] takes an assignment of the mortgage, this operates a discharge, and the lien of the mortgage is gone;[3] and the same principle will be applied to a tax-title.[4] If the purchaser of mortgaged property, who has agreed with his grantor to assume and pay the mortgage as a part of his purchase-money, causes the conveyance of the property to be made to a third party instead of taking it to himself, and then obtains an assignment of the mortgage to himself instead of having it discharged, this will as to the vendor operate an extinguishment of the mortgage;[5] the rights of such third party are no greater than those of the original purchaser.[6] So also one for whom property is held in trust, and whose equitable duty it is to pay a mortgage upon the property, though he may not be legally bound therefor, cannot, after paying the mortgage-debt, keep the mortgage alive by procuring it to be assigned to himself, or to a third person for his benefit; his payment discharges the mortgage.[7] By an arrangement between two mortgagors, one of them assumed the payment of the whole debt, and gave to the mortgagee a new mortgage upon the same and other property, to secure both the old debt and a new indebtedness of his own, the former joint mortgage being also retained by the creditor as collateral security. A purchaser of the property covered by the new mortgage then paid off the latter security, and took an assignment of the old joint mortgage; and this transaction was held to operate a discharge of the old mortgage.[1]

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[1] Mickles *v.* Townsend, 18 N. Y. 575; Mickles *v.* Dillaye, 15 Hun (N. Y.), 296; Wadsworth *v.* Williams, 100 Mass. 126.

[2] Crowley *v.* Harader, 69 Iowa, 83.

[3] Russell *v.* Pistor, 7 N. Y. 171; Ely *v.* McNight, 30 How. Pr. (N. Y.) 97; Kilborn *v.* Robbins, 8 Allen (Mass.), 466; Hoysradt *v.* Holland, 50 N. H. 433; Jerome *v.* Seymour, Harringt. (Mich.) 357; Fretland *v.* Mack, 76 Iowa, 434; Byington *v.* Fountain, 61 Iowa, 512; Winans *v.* Wilkie, 41 Mich. 264; Parry *v.* Wright, 5 Russ. 142.

[4] Bertram *v.* Cook, 32 Mich. 518; Stinson *v.* Richardson, 48 Iowa, 541.

[5] Frey *v.* Vanderhoof, 15 Wisc. 397.

[6] Wright *v.* Patterson, 45 Mich. 261; Reid *v.* Sycks, 27 Ohio St. 285.

[7] Putnam *v.* Collamore, 120 Mass. 454.

§ 48. **Subrogation of a Dowress who has paid a Paramount Lien on the Property.**—A widow who was entitled to dower, but had not yet had it assigned to her, remained in the mansion-house of her deceased husband with her infant children, whom she supported. She then paid a balance of the purchase-money which remained due upon the property, and which was secured by a vendor's lien thereon; and she also paid out money for the taxes upon the property and for improvements: and it was held that she should be subrogated to the liens upon the property which existed respectively for the purchase-money and for the taxes which she had paid, except so far as it was her duty as dowress to pay the same, though she had no lien for what she had spent in making improvements.[2] She is entitled to be subrogated to a lien which she has paid off, in order to preserve the property in which she thus has an interest.[3]

§ 49. **Widow's Right of Dower against a Purchaser who has paid an Incumbrance to which her Dower was subject.** — As the purchaser of an equity of redemption may be subrogated to the lien of prior incumbrances which he has paid in order to preserve his property, without having been under any personal obligation for their payment,[4] so, *a fortiori*, if such a purchaser takes an assignment of a previous mortgage, this will not operate an extinguishment of the lien of the mortgage.[5] And if the mortgagor's widow was entitled to dower or homestead as against such purchaser, but not as against the mortgagee, then, after such an assignment from the latter to the former, she cannot have her dower or her homestead without redeeming from the mortgage, which, however, she will have the right to do.[1] A quitclaim deed of the mortgaged premises from the mortgagee to such a purchaser, after a breach of the condition of the mortgage, is a sufficient assignment of the mortgage.[2] The mortgage will be kept alive where this is manifestly for the interest of the party who has paid it, and is consistent with the justice of the case, if no contrary intent is expressed or manifestly implied;[3] in other words, the mortgage will be kept alive for the benefit of one who has paid it,[4] where he is evidently entitled in equity to be subrogated to it, and does not appear to have done anything to waive the right,[5] though it is sometimes said that if the purchaser has simply paid off the mortgage and had it discharged, not having taken an assignment of it, or in any way indicated an intention to avail himself of its lien, he cannot set it up against the claim of the mortgagor's widow for dower.[6] The release of dower in a mortgage-deed works an estoppel, not only in favor of the mortgagee and the direct assignees of the mortgage, but also of those who by subrogation become entitled to its benefits.[7] The dower rights of the mortgagor's widow, having been released in the mortgage, though valid against the purchaser of the equity, must remain subject to the mortgage after this has been assigned

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[1] McGiven *v.* Wheelock, 7 Barb. (N. Y.) 22

[2] Simmons *v.* Lyle, 32 Gratt. (Va.) 752.

[3] Gatewood *v.* Gatewood, 75 Va. 407; Roach *v.* Hacker, 2 Lea (Tenn.), 633; Stinson *v.* Anderson, 96 Ills. 373.

[4] *Antea*, §§ 13, 28.

[5] Selb *v.* Montague, 102 Ills. 446; De Lisle *v.* Herbs, 25 Hun (N. Y.), 485; Simonton *v.* Gray, 34 Maine, 50.

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[1] Lamb *v.* Montague, 112 Mass. 352; Gibson *v.* Crehore, 3 Pick. (Mass.) 475; s. c. 5 Pick. (Mass.) 146; Carll *v.* Butman, 7 Greenl. (Me.) 102; Simonton *v.* Gray, 34 Maine, 50; Kenyon *v.* Segar, 14 R. I. 490; Hinds *v.* Ballou, 44 N. H. 619; Woodhull *v* Reid, 1 Harrison (16 N. J. L.), 128.

[2] Savage *v.* Hall, 12 Gray (Mass.), 363; Hinds *v.* Ballou, 44 N. H. 619; Carll *v.* Butman, 7 Greenl. (Me.) 102.

[3] Hinds *v.* Ballou, 44 N. H. 619; Price *v.* Hobbs, 47 Md. 359; Bryar's Appeal, 111 Penn. St. 81.

[4] As in Popkin *v.* Bumstead, 8 Mass. 491.

[5] *Antea*, § 12.

[6] Cox *v.* Garst, 105 Ills. 342; Atkinson *v.* Angert, 46 Mo. 515, 518.

[7] Dearborn *v.* Taylor, 18 N. H. 153; McMahon *v.* Russell, 17 Fla. 698; Walker *v.* Walker, 5 Ills. App. 289.

extinguished, so as to let in the widow's claim of dower, which was released in the mortgage, unless the debt has been paid by her husband, the mortgagor, or from his means, or by some one who stands in such relation to him as to be in legal effect the debtor, whose duty it is to pay and discharge the mortgage-debt.[1]

§ 50. **Dower let in if Debt paid by one bound to pay it.** — If, however, the mortgage-debt has been paid by one bound to pay it, then the mortgage will be regarded as extinguished, whether or not it has been assigned to the party making the payment.[2] Whether any particular transaction shall be held to operate as a payment which extinguishes the lien, or as an assignment, which preserves and keeps it on foot, does not depend so much upon the form of words used as upon the relations subsisting between the parties advancing the money and the party executing the transfer or release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises from the lien of the mortgage, a duty in the proper performance of which others have an interest, it will be held to be a release and not an assignment, although in form it purports to be an assignment.[3] If the payment is made by an heir-at-law of the mortgagor, pursuant to the terms of a bond given by him to the administrator to pay the debts of the deceased, in order to prevent his real estate from being sold therefor, this payment will extinguish the mortgage in favor of the widow's claim to dower.[4] If the mortgage-debt has in substance been paid from the means or estate of the principal debtor, this will let in the widow's claim to dower, which was barred by the mortgage.[1]

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[1] *Shaw, C. J.*, in Brown *v.* Lapham, 3 Cush. (Massachusetts) 551; Cockrill *v.* Armstrong, 31 Arkansas, 580.

[2] *Antea*, § 74; McCabe *v.* Swap, 14 Allen (Mass.), 188; Norris *v.* Morrison, 45 N. H. 490; Collins *v.* Torry, 7 Johns. (N. Y.) 278; Atkinson *v.* Stewart, 46 Mo. 510.

[3] *Shaw, C. J.*, in Brown *v.* Lapham, 3 Cush. (Mass.) 551; Hatch *v.* Palmer, 58 Maine, 271.

[4] King *v.* King, 100 Mass. 224.

§ 51. **The widow may redeem. Her Rights thereupon.** — A widow who is entitled to dower in an equity of redemption may redeem the estate by paying off the whole of the mortgage-debt;[2] and upon so doing she will, without specific proof of her intent at the time of payment to keep the mortgage alive,[3] be subrogated to the place of the mortgagee for her protection and indemnity, until the heirs shall reimburse her their equitable proportion, and thus redeem from her all that is not comprehended in her claim of dower.[4] When another claiming, like herself, under the mortgagor, redeems the mortgaged estate, she may share in the benefit of the redemption, upon paying her equitable proportion of the mortgage-debt, according to the value of her dower interest;[5] or she may be assigned her dower in the excess of the value of the estate over the amount of the mortgage-debt.[6] An assignment of the mortgage to her will not merge her dower interest.[7] And a wife who has joined with her husband in a mortgage of both his land and his personal property, has, after the death of her husband, an equitable right to have the mortgaged personalty first applied to the payment of the mortgage-debt, both against the mortgagee and also against the general creditors of her husband's estate;[1] if she has given a mortgage of her own real estate, merely to secure a debt of her husband's, she is entitled to have his interest in the estate as tenant by the curtesy first sold and applied to pay the debt, in exoneration of her own interest in the mortgaged premises, even against another creditor of her husband, who holds a general lien upon his interest in the premises, created subsequently to the execution of the mortgage.[2] But if she has joined with her husband in a mortgage of his real estate, she is not entitled to have the debt satisfied exclusively out of her husband's interest in such real estate, so as to give her dower out of the whole estate, notwithstanding the mortgage; she can be endowed only in the equity of redemption,[3] except as against those entitled to her husband's estate, in the case of the mortgage-debt being his personal debt, which she may require his representatives to pay out of his personal estate.[4]

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[1] Peckham *v.* Hadwen, 8 R. I. 160; Ketchum *v.* Shaw, 28 Ohio St. 503; Sweaney *v.* Malony, 62 Mo. 485; Atkinson *v.* Stewart, 46 Mo. 510.

[2] Davis *v.* Wetherell, 13 Allen (Mass.), 60; McCabe *v.* Bellows, 7 Gray (Mass.), 148, overruling in part Van Vronker *v.* Eastman, 7 Met. (Mass.) 157.

[3] Jefferson *v.* Edrington, 53 Ark. 545.

[4] Rossiter *v.* Cossit, 15 N. H. 38; Woods *v.* Wallace, 30 N. H. 384; Norris *v.* Morrison, 45 N. H. 490; Mantz *v.* Buchanan, 1 Md. Ch. Dec. 202; Atkinson *v.* Stewart, 46 Mo. 510.

[5] Jones *v.* Gilbert, 135 Ills. 27; Cox *v.* Garst, 105 Ills. 342; Gibson *v.* Crehore, 5 Pick. (Mass.) 146; Norris *v.* Morrison, 45 N. H. 490; Evertsen *v.* Tappen, 5 Johns. Ch. (N. Y.) 497.

[6] Snyder *v.* Snyder, 6 Mich. 470; Norris *v.* Morrison, 45 N. H. 490; Richardson *v.* Skolfield, & Pratt *v.* Skolfield, 45 Maine, 386; George *v.* Cooper, 15 W. Va. 666; Stoppelbeir *v.* Shultc, 1 Hill (So. Car.) 200.

[7] Hunter *v.* Dennis, 112 Ills. 568.

§ 52. **The Rule in Massachusetts.** — The rules adopted in Massachusetts applicable to all these cases have been succinctly but fully stated by an eminent judge,[5] as follows: —

"*First.* When a purchaser pays off a mortgage to which the right of dower would be subject, merely to clear the estate of the incumbrance, and not by virtue of any obligation to pay the mortgage-debt, and takes an assignment or a conveyance of his interests from the mortgagee, he may stand on the mortgage title if he please, and then no dower can be assigned without payment of the whole mortgage-debt by the demandant.[6]

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[1] Harrow *v.* Johnson, 3 Met. (Ky.) 578.

[2] Neimcewicz *v.* Gahn, 3 Paige (N. Y.), 614.

[3] Hawley *v.* Bradford, 9 Paige (N. Y.) 200; Leavenworth *v.* Cooney, 48 Barb. (N. Y.) 570; Denton *v.* Nanny, 8 Barb. (N. Y.) 618, 619.

[4] Campbell *v.* Campbell, 30 N. J. Eq. 415; Mantz *v.* Buchanan, 1 Md. Ch. Dec. 202; Creecy *v.* Pearce, 69 Nor. Car. 67; Henagan *v.* Harllee, 10 Rich. Eq. (So. Car.) 285; Hunsucker *v.* Smith, 49 Ind. 114; Greenbaum *v.* Austrian, 70 Ills. 591.

[5] *Wells, J.*, in McCabe *v.* Swap, 14 Allen (Mass.), 188, 190.

[6] Strong *v.* Converse, 8 Allen

merger of the first mortgage.[1] The assignment of a mortgage to one who has purchased the equity of redemption will or will not operate an extinguishment of the mortgage, according to the interest of the party taking the assignment and the just intent of the parties.[2] If the owner of mortgaged premises conveys different parts of them to separate grantees, and one of these pays and takes an assignment of the mortgage, he can, in the absence of circumstances which would make this inequitable,[3] hold it against all the mortgaged premises.[4] And if the purchaser of a bare equity of redemption which is subject to two mortgages takes an assignment of the first mortgage for the protection of his title, this mortgage will not be thereby merged in the equity, so as to give to the holder of the junior mortgage a preference in payment out of the proceeds of the mortgaged property.[5] And generally a mortgage which is assigned to one, not being the debtor, but having an interest in the mortgaged premises, is not thereby extinguished if it is for the interest of the assignee to uphold it;[6] this equitable doctrine of subrogation has so far been adopted at common law as to prevent a merger.[7] If the equity of redemption was subject when purchased to an attachment against the mortgagor which was junior to the mortgage, this will prevent a merger of the mortgage upon an assignment of the latter to the purchaser of the equity.[8]

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[1] Evans *v.* Kimball, 1 Allen (Mass.), 240; Spurgin *v.* Adamson, 62 Iowa, 661.

[2] Hunt *v.* Hunt, 14 Pick. (Mass.) 374; Crosby *v.* Taylor, 15 Gray (Mass.), 64; Binsse *v.* Paige, 1 Abbott (N. Y. App. Dec.), 138; Franklyn *v.* Hayward, 61 How. Pr. (N. Y.) 43.

[3] *Postea,* §§ 75 *et seq.*

[4] Casey *v.* Buttolph, 12 Barb. (N. Y.) 637; Scott *v.* Webster, 44 Wisc. 185.

[5] Millspaugh *v.* McBride, 7 Paige (N. Y.) 509; Green *v.* Currier, 63 N. H. 563. And see McKinstry *v.* Mervin, 3 Johns. Ch. (N. Y.) 466.

[6] Fellows *v.* Dow, 58 N. H. 21; Carpenter *v.* Gleason, 58 Vt. 244; Van Wagenen *v.* Brown, 26 N. J. Law, 196; Rawiszer *v.* Hamilton, 51 How. Pr. (N. Y.) 297.

[7] Hatch *v.* Kimball, 16 Maine, 146; Goodwin *v.* Keney, 47 Conn. 486; Duffy *v.* McGuinness, 13 R. I. 595; Knowles *v.* Lawton, 18 Ga. 476.

[8] Grover *v.* Thatcher, 4 Gray (Mass.), 526.

§ 54. **Tests by which Merger is determined.** — Nor is it necessary that the intent to keep the mortgage alive should have been manifested at the time of the payment otherwise than by taking an assignment of the security; unless there appears to have been an intention to extinguish it, it will be taken to be subsisting or extinguished, as the interest of the party may require.[1] The merger of a charge in the inheritance will not be presumed, if this would be contrary to the interest of the owner of both the charge and the inheritance.[2] The merger is prevented, and the charge or mortgage upheld, whenever there is a strong equity in favor of it, but never where it is not for an innocent purpose.[3] If they are held in different rights, there will be no merger.[4] When a charge on an estate becomes absolutely vested in the owner of the inheritance, the tests usually applied for ascertaining whether the charge has merged, are, — *first*, whether there has been an actual expression of intention to that effect;[5] *secondly*, whether the acts done by the owner of the estate are only consistent with the maintaining of the charge,[6] and, *thirdly*, whether it is for the interest of the owner that the charge should not be merged in the inheritance.[7]

§ 55. **Incumbrance so assigned, kept alive only for a Good Purpose and to protect a Beneficial Interest.** — The owner of an equity of redemption who has taken an assignment of the mortgage cannot keep it on foot to the prejudice of a *bona fide* purchaser under himself,[1] nor unless some beneficial interest is shown to require it.[2] And if the payment appears to have been intended at the time to extinguish the charge, it will have that effect.[3] When the owner of the equity paid the amount which was due upon the mortgage, without then manifesting any intention of keeping the mortgage in force, and without any agreement for an assignment of the mortgage, but many years afterwards took an assignment of the mortgage and the notes secured by it, this transaction was held to operate a discharge of the mortgage.[4] But it is a general rule that where a discharge of a mortgage has been taken inadvertently and under a mistake of fact, equity will keep the mortgage alive and treat the transaction as an assignment, when necessary to protect the rights of the parties.[5]

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[1] Evans *v.* Burns, 67 Iowa, 179; Strever *v.* Earl, 60 Hun (N. Y.), 528; Buzzell *v.* Still, 63 Vt. 490; Pool *v.* Hathaway, 22 Maine, 85; Hatch *v.* Kimball, 16 Maine, 146.

[2] Pride, *in re*, Shackell *v.* Colnett, 2 Ch. D. (1891) 135; Forbes *v.* Moffatt, 18 Ves. 384; Davis *v.* Barrett, 14 Beav. 542; Smith *v.* Roberts, 91 N. Y. 470; Shimer *v.* Hammond, 51 Iowa, 401.

[3] McClain *v.* Sullivan, 85 Ind. 174; Hatch *v.* Kimball, 16 Maine, 146.

[4] Radcliffe, *in re*, 1 Ch. D. (1892) 227.

[5] Lewis *v.* Hinman, 56 Conn. 55.

[6] See Gunter *v.* Gunter, 23 Beav. 571; Hatch *v.* Skelton, 20 Beav. 453; Hood *v.* Phillips, 3 Beav. 513.

[7] Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244; Lynch *v.* Pfeiffer, 110 N. Y. 33; Ann Arbor Bank *v.* Webb, 56 Mich. 377; Watson *v.* Dundee Mortgage Co., 12 Oreg. 474.

§ 56. **Mortgage assigned to the Principal Debtor is extinguished.** — If the mortgage-debt is paid by the principal debtor, or out of his funds, it cannot be kept alive by being assigned to him or to a mere agent for him.[6] And the grantee of a mortgaged estate who has accepted a deed of the equity of redemption without covenants will be held, in the absence of a special contract, and without some special circumstances, to take the land charged with the incumbrance, as between himself and his grantor.[7] Accordingly he cannot, after paying off the debt, keep it alive against his

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[1] Starr *v.* Ellis, 6 Johns. Ch. (N. Y.) 393.

[2] Gardner *v.* Astor, 3 Johns. Ch. (N. Y.) 53; Starr *v.* Ellis, 6 Johns. Ch. (N. Y.) 393.

[3] Lewis *v.* Hinman, 56 Conn. 55; Agnew *v.* Renwick, 27 So. Car. 562; Champney *v.* Coope, 34 Barb. (N. Y.) 539.

[4] Given *v.* Marr, 27 Maine, 212.

[5] Short *v.* Currier, 153 Mass. 182; Eversen *v.* McMullen, 113 N. Y. 293; Barnes *v.* Mott, 64 N. Y. 397; Kinsley *v.* Davis, 74 Maine, 498; Cobb *v.* Dyer, 69 Maine, 494; Hammond *v.* Barker, 61 N. H. 53; Coudert *v.* Coudert, 43 N. J. Eq. 408; Barta *v.* Vreeland, 15 N. J. Eq. 103.

[6] Morse *v.* Bassett, 132 Mass. 502; Angel *v.* Boner, 38 Barb. (N. Y.) 425; Champney *v.* Coope, 34 Barb. (N. Y.) 539; Shepherd *v.* McClain, 18 N. J. Eq. 128.

[7] *Antea*, § 26.

under his prior title; and the holder of the junior lien may still redeem from him as before;[1] or the equity of redemption from the junior lien may still be foreclosed.[2] The estates of the mortgagor and of the mortgagee, though united in the same person, will still be treated as distinct, when this is necessary for just purposes and to effectuate the proper intention of the parties.[3] Though the purchase of the equity of redemption by the mortgagee generally operates to extinguish the mortgage-debt and to merge the mortgage-title,[4] this will not be so where it is the intention and the interest of the mortgagee to keep the mortgage alive by reason of intervening incumbrances or otherwise,[5] and this can be done without injury to the mortgagor or to third parties.[6] Even if the mortgagee, in consideration of the conveyance to him of the equity of redemption, gives up the evidence of the mortgage-debt, or acknowledges its satisfaction, this will not

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Wood, 5 Vt. 250; Myers *v.* Brownell, 1 D. Chip. (Vt.) 448; Day *v.* Mooney, 4 Hun (N. Y.), 134; Wallace *v.* Blair, 1 Grant (Pa. Cas.), 75; Edgerton *v.* Young, 43 Ills. 464; Lydecker *v.* Bogert, 38 N. J. Eq. 136; Thebaud *v.* Hollister, 37 N. J. Eq. 402; Smith *v.* Swan, 69 Iowa, 412; Lyon *v.* McIlvaine, 24 Iowa, 9; Wickersham *v.* Reeves, 1 Iowa, 413; Besser *v.* Hawthorne, 3 Oregon, 129.

[1] Thompson *v.* Chandler, 7 Greenl. (Me.) 377; Kinney *v.* Ensign, 18 Pick. (Mass.) 232; Fouche *v.* Swain, 80 Ala. 151; Fuller *v.* Lamar, 53 Iowa, 477; Strong *v.* Burdick, 52 Iowa, 630; Rogers *v.* Herron, 92 Ills. 583.

[2] Cochran *v.* Goodell, 131 Mass. 464; Cronin *v.* Hazletine, 3 Allen (Mass.), 324; Doten *v.* Hair, 16 Gray (Mass.), 149; Palmer *v.* Fowley, 5 Gray (Mass.), 545; Walters *v.* Defenbaugh, 90 Ills. 241.

[3] Hutchins *v.* Carleton, 19 N. H. 487; Bean *v.* Boothby, 57 Maine, 295; Clos *v.* Boppe, 23 N. J. Eq. 270; Flanigan *v.* Sable, 44 Minn. 417; Ætna Ins. Co. *v.* Corn, 89 Ills. 170; Meacham *v.* Steele, 93 Ills. 135.

[4] Bleckeley *v.* Branyan, 28 So. Car. 445; s. c., 26 *Id.* 424.

[5] Bell *v.* Tenney, 29 Ohio St. 240; Haggerty *v.* Byrne, 75 Ind. 499; International Bank *v.* Wilshire, 108 Ills. 143; Cohn *v.* Hoffman, 45 Ark. 376; Patterson *v.* Mills, 69 Iowa, 755; McCrossen *v.* Harris, 35 Kans. 178; McClaskey *v.* O'Brien, 16 W. Va. 792.

[6] Adams *v.* Angell, 5 Ch. Div. 634; Simpson *v.* Hall, 47 Conn. 417; Delaware & Hudson Canal Co. *v.* Bonnell, 46 Conn. 9; Campbell *v.* Vedder, 1 Abbott (N. Y. App. Dec.), 295; James *v.* Morey, 2 Cow. (N. Y.) 246; Mulford *v.* Peterson, 35 N. J. Law, 127; Pike *v.* Gleason, 60 Iowa, 150; Vannice *v.* Bergen, 16 Iowa, 555; Webb *v.* Meloy, 32 Wisc. 319; Grellet *v.* Heilshorn, 4 Nevada, 526.

necessarily extinguish his mortgage for the benefit of the holder of a subsequent lien.[1] In equity a merger will not take place unless the purposes of justice or the intentions of the parties so demand.[2] The manifest intention of the parties at the time of the transaction will determine whether the lien is preserved or extinguished.[3] An express written agreement that there shall be no merger will prevent it.[4] The holder of a mortgage may keep it alive as a part of his title after acquiring the equity of redemption,[5] if this is necessary for the preservation of his rights.[6]

§ 58. **Conveyance of Equity in Payment of Prior, will not advance Junior, Incumbrance.** — A mortgagee having received from the mortgagor a deed of the mortgaged premises which contained a recital that the deed was to cancel the mortgage, and the land having been taken upon an attachment made before the execution of the deed and consummated by a levy afterwards, and the mortgage and the mortgage-notes having been retained by the mortgagee under a parol agreement with the mortgagor to await the result of the attachment, it was held that the taking of this deed did not extinguish the mortgage in favor of the attaching creditor: for one party is not to be estopped by the recitals in a deed which he has taken from giving the truth in evidence to sustain it, against another party who is seeking to go behind the deed to prevent its operation.[1] The retention by a mortgagee of his mortgage and mortgage note or bond, on taking a conveyance of the mortgaged premises, is *prima facie* sufficient evidence of his intention to keep the mortgage alive to prevent a merger.[2] And if he has cancelled his mortgage by reason of the junior incumbrance having been fraudulently concealed from him, he may by seasonable proceedings have the discharge cancelled, and be reinstated in his prior lien over the holder of the junior charge,[3] though this has been refused where no fraud was practised upon him.[4] So he may have the satisfaction cancelled and his mortgage reinstated, if his purchase of the equity, which was the consideration of the satisfaction, is afterwards set aside.[5] If the rights of the parties require it, if for example the conveyance of the equity was made merely for a further security, and it was to be reconveyed upon a fixed payment,[6] equity will regard a mortgage as remaining in force, though a deed of the equity of redemption has been accepted as a foreclosure thereof.[7]

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[1] Baldwin *v.* Norton, 2 Conn. 161, 709; New England Jewelry Co. *v.* Merriam, 2 Allen (Mass.), 390; Hemenway *v.* Bassett, 13 Gray (Mass.), 378; Richardson *v.* Hockenhull, 85 Ills. 124; Simpson *v.* Pease, 53 Iowa, 572; Stanton *v.* Thompson, 49 N. H. 272; Adams *v.* Angell, 5 Ch. Div. 634.

[2] Sheldon *v.* Edwards, 35 N. Y. 279; Bascom *v.* Smith, 34 N. Y. 320; Waterloo Bank *v.* Elmore, 52 Iowa, 541; Carpenter *v.* Brenham, 40 Calif. 221; Woodward *v.* Davis, 53 Iowa, 694.

[3] Oregon Trust Co. *v.* Shaw, 6 Sawyer, C. C. 52 and 5 Id. 336; Aldrich *v.* Blake, 134 Mass. 582; Mexall *v.* Dearborn, 12 Gray (Mass.), 336; Tower *v.* Divine, 37 Mich. 443.

[4] Spencer *v.* Ayrault, 10 N. Y. 202; Fowler *v.* Fay, 62 Ills. 375; Agnew *v.* Charlotte R. R. Co., 24 So. Car. 18; Gresham *v.* Ware, 79 Ala. 192.

[5] New Jersey Ins. Co. *v.* Meeker, 40 N. J. Law, 18; Lockwood *v.* Sturdevant, 6 Conn. 374; Polk *v.* Reynolds, 31 Md. 106; Hoppock *v.* Ramsay, 28 N. J. Eq. 413; Mobile Bank *v.* Hunt, 8 Ala. 876.

[6] Jackson *v.* Evans, 44 Mich. 510.

§ 59. **When a Conveyance of the Equity to the Mortgagee will be regarded as a Payment of the Mortgage-debt.** — Whether the mortgage-debt will be considered to have been paid by a conveyance of the equity of redemption to the mortgagee, will depend upon the intention of the parties.[8] Where a mortgagor of land, by deed, for a valuable consideration ex-

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[1] Crosby *v.* Chase, 17 Maine, 369.

[2] Dunphy *v.* Riddle, 86 Ills. 22.

[3] Young *v.* Hill, 31 N. J. Eq. 429.

[4] Bleckeley *v.* Branyan, 26 So. Car. 424.

[5] Hemstreet *v.* Burdick, 90 Ills. 444; Corwin *v.* Collett, 16 Ohio St. 289; Kieser *v.* Baldwin, 62 Ala. 526.

[6] McElhaney *v.* Shoemaker, 76 Iowa, 416.

[7] Decatur *v.* Walker, 137 Mass. 141; Worcester Bank *v.* Cheeney, 87 Ills. 602; Stimpson *v.* Pease, 53 Iowa, 572; Rumpp *v.* Gerkens, 59 Calif. 496; Brooks *v.* Rice, 56 Calif. 428.

[8] Germania Building Association *v.* Neill, 93 Penn. St. 322; Huebsch *v.* Scheel, 81 Ills. 281; Sanborn *v.* Magee, 79 Iowa, 501.

effect.[1] Elsewhere the presumption has been said to be the other way; that the mortgage-debt is paid by such a conveyance unless it appears that the parties intended otherwise.[2] It has even been held that such a conveyance of part of the mortgaged premises will operate an extinguishment of the mortgaged-debt *pro tanto;*[3] but that it will be only *pro tanto* an extinguishment, although this conveyance of part of the mortgaged property comes from one who had purchased that part from the mortgagor, and had agreed to pay off the whole mortgage.[4]

§ 60. **An Intervening Estate will prevent a Merger.** — If the holder of a mortgage which is the oldest lien upon the property, and which is for an amount exceeding the value of the property, takes from the mortgagor a conveyance of the mortgaged premises to save the expense of a foreclosure, this will not operate a merger of his mortgage-title, so as to enable the holder of a junior lien to take the premises without paying the first mortgage-debt.[5] But if the senior mortgagee should purchase the mortgaged premises from the mortgagor and undertake to pay the junior incumbrance, deducting its amount from the price of his purchase, this would postpone the lien of his senior mortgage to that of the junior incumbrance.[6] It has been said to be a general principle that whenever the owner of an estate has also a charge upon it, and there is another intermediate charge or estate between his own charge and his ownership in fee, then no presumption without some special act can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate;[1] but if the intervening estate were created by the act of the owner himself, this reasoning would have no application.[2]

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[1] Dickason *v.* Williams, 129 Mass. 182; Hemenway *v.* Bassett, 13 Gray (Mass.), 378; Holman *v.* Bailey, 3 Met. (Mass.) 55.

[2] Bassett *v.* Mason, 18 Conn. 131; Burnet *v.* Denniston, 5 Johns. Ch. (N. Y.) 35; Clift *v.* White, 12 N. Y. 519; Spencer *v.* Harford, 4 Wend. (N. Y.) 381; Seighman *v.* Marshall, 17 Md. 550; Wilhelmi *v.* Leonard, 13 Iowa, 330; McCormick *v.* Bauer, 122 Ills. 573; Lilly *v.* Palmer, 51 Ills. 331; Astley *v.* Milles, 1 Sim. 298; Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244.

[3] Wilhelmi *v.* Leonard, 13 Iowa, 330; Trimmier *v.* Vise, 17 So. Car. 499.

[4] Klock *v.* Cronkhite, 1 Hill (N. Y.), 107.

[5] Campbell *v.* Carter, 14 Ills. 286, 289; Jarvis *v.* Frink, 14 Ills. 396; Adams *v.* Angell, 5 Ch. Div. 634; Troost *v.* Davis, 31 Ind. 34.

[6] Fowler *v.* Fay, 62 Ills. 375.

§ 61. **The Doctrine of Two Funds.** — Where one creditor holds security upon two funds or estates, with perfect liberty to resort to either for the payment of his demand, and another creditor holds a junior security upon one only of these funds, equity will compel the former creditor to exhaust the fund which he alone can hold as security, before coming upon the latter fund, and thereby depriving the latter creditor of his security;[3] and in a decree foreclosing a junior mortgage, the senior mortgagee may be ordered to exhaust for the satisfaction of his claim all the other property described in the senior mortgage, before resorting to that which is covered by the junior mortgage.[4] If one judgment-creditor has two funds out of which he may collect his debt, and a junior judgment-creditor can reach only one of these funds, the prior creditor must first resort to that fund over which he has the exclusive control.[5] The junior creditor may also pay off the prior security, and be subrogated to the prior creditor's rights over both funds.[1] If the prior incumbrancer does exhaust the only fund which is pledged to the holder of the junior lien, the latter is entitled to be subrogated to the former's lien upon the other fund, or to any balance thereof remaining after the full payment of the prior lien, of which the senior creditor might and should have availed himself.[2] A creditor holding a mechanic's lien, properly perfected, will be protected by the application of the same doctrine.[3] A bank holding a judgment against one of its stockholders, for which, besides its judgment-lien upon his real estate, it has also a lien upon his stock, may indeed collect its judgment out of his real estate; but his other judgment-creditors, who are thereby deprived of the opportunity of collecting their money, shall be subrogated to the rights of the bank, so as to enable them to hold the debtor's bank stock.[4] As the creditor having the choice of two funds ought so to exercise his right of election as not to injure those creditors who can resort to only one of these funds,[5] so if he, in the exercise of his legal right, exhausts that fund, to which alone the other creditors can resort, equity will place them in his situation, so far as he has applied their funds to the satisfaction of his claim.[6]

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[1] Scrivner *v.* Dietz, 84 Calif. 295; Asche *v.* Asche, 113 N. Y. 232; Belknap *v.* Dennison, 61 Vt. 520; Gray *v.* Nelson, 77 Iowa, 63; Collins *v.* Stocking, 98 Mo. 290.

[2] Johnson *v.* Webster, 4 De G., M. & G. 474.

[3] Gibson *v.* Seagrim, 20 Beav. 614; Lanoy *v.* Athol, 2 Atk. 446; Fox, *in re*, 5 Irish Ch. 541; Merchants' Bank *v.* McLaughlin, 1 McCrary, C. C. 258; Russell *v.* Howard, 2 McLean, C. C. 489; Warren *v.* Warren, 30 Vt. 530; York & Jersey Steamboat Co. *v.* Jersey Co., Hopkins, Ch. (N. Y.) 460; Baird *v.* Jackson, 98 Ills. 78; Wise *v.* Shepherd, 13 Ills. 41; Glass *v.* Pullen, 6 Bush (Ky.), 346; Rust *v.* Chisolm, 57 Md. 376, 383; Pettibone *v.* Stevens, 15 Conn. 19; Ball *v.* Setzer, 33 W. Va. 444; Hannegan *v.* Hannah, 7 Blackf. (Ind.) 353; Davis *v.* Walker, 51 Miss. 659; Gusdorf *v.* Ikelheimer, 75 Ala. 148; Nelson *v.* Dunn, 15 Ala. 501.

[4] Swift *v.* Conboy, 12 Iowa, 444; Hamilton *v.* Schwehr, 34 Md. 107; Terry *v.* Rosell, 32 Ark. 478; Geller *v.* Hoyt, 7 How. Pr. (N. Y.) 265; Turner *v.* Flinn, 67 Ala. 529; Henshaw *v.* Wells, 9 Humph. (Tenn.) 568; Davenport Plow Co. *v.* Mewis, 10 Nebraska, 317; Sternberg *v.* Valentine, 6 Mo. App. 176.

[5] Reynolds *v.* Tooker, 18 Wend. (N. Y.) 591.

§ 62. **A Creditor whose Fund has been taken to pay a Prior Debt subrogated to the Lien of that Debt on Other Funds.** —

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[1] Washburn *v.* Hammond, 151 Mass. 132; King *v.* Nichols, 138 Mass. 18, 21.

[2] Mower's Trusts, *in re*, L. R. 8 Eq. 110; Dolphin *v.* Aylward, L. R. 4 Ho. Lds. 486; Hunt *v.* Townsend, 4 Sandf. Ch. (N. Y.) 510; Cheeseborough *v.* Millard, 1 Johns. Ch. (N. Y.) 409; Slade *v.* Van Vechten, 11 Paige (N. Y.). 21; Ingalls *v.* Morgan, 10 N. Y. 178; Gist *v.* Pressley, 2 Hill Eq. (So. Car.) 318.

[3] Rust *v.* Chisolm, 57 Md. 383; Kenny *v.* Gage, 33 Vt. 302.

[4] Ramsey's Appeal, 2 Watts (Penn.), 228.

[5] The Edward Oliver, L. R. 1 Adm. & Ec. 379; Hurd *v.* Eaton, 28 Ills. 122; Wartz *v.* Hart, 13 Iowa, 515; Lee *v.* Buck, 13 So. Car. 178; Messervey *v.* Barelli, 2 Hill Eq. (So. Car.) 567.

[6] Alston *v.* Mumford, 1 Brock. C. C. 266; Foot, *in re*, 8 Benedicts, 228; Delaware & Hudson Canal Co.'s Appeal, 38 Penn. St. 512; Bank of Kentucky *v.* Vance, 4 Litt. (Ky.) 168; Wolf *v.* Ferguson, 129 Penn. St. 272.

work an injustice to the creditor having the prior lien to restrict him to only one fund.[1] It is never applied where its enforcement would prejudice the rights of the prior creditor,[2] or where it would delay him in obtaining his payment.[3] It will not be applied against the prerogative right of the government to hold all the property of its debtor.[4] The prior creditor cannot be compelled to confine himself to only one of the funds, unless that fund is shown to be sufficient to satisfy his demand.[5] He will not be compelled to resort to a fund of which he can realize the benefit only by litigation;[6] if he holds both a prior mortgage and also certain promissory notes as collateral security for the same debt, the holder of a junior lien upon the mortgaged premises cannot require him to prosecute suits upon the notes before foreclosing his mortgage.[7] A mortgagee of both the goods and the accounts of his debtor will not be obliged to collect the accounts and apply their proceeds upon his claim against the debtor, in order to aid other creditors who are unsecured.[1] Or, if the prior mortgagee, in an action for his debt, obtains the additional security of a sufficient attachment, but the validity of this attachment is contested in another action, a junior mortgagee cannot require him to litigate this question before resorting to the mortgaged property.[2] Nor will the prior creditor be compelled to go into another jurisdiction, there to prosecute the fund to which he has the exclusive right.[3] But if the avails of property constituting the first fund, though orginally beyond the jurisdiction, have been brought within the jurisdiction, the senior creditor must resort to them.[4] And it has been said that the principle that one creditor shall not take a part of a fund which would otherwise have been available for all the creditors, and at the same time be allowed a proportionate share of the remainder of that fund with the other creditors, does not apply to a case in which the first creditor by his diligence obtains something which could not form a part of that fund.[5] But the prior creditor must be able to show what disposition he has made of the fund that was exclusively his.[6] And he may not voluntarily put himself in a position where he will be embarrassed by the enforcement of the rights already vested in the junior creditor.[7] The fact that the prior creditor holds also a third lien on the first fund, inferior in date to the junior creditor's lien, will not be sufficient to exempt the prior creditor from the operation of the ordinary rule.[8] The junior creditor's right of subrogation to the securities of which the senior creditor has declined to avail himself will be preserved after the satisfaction of the latter.[1]

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[1] Woolcocks *v.* Hart, 1 Paige (N. Y.), 185; James *v.* Hubbard, 1 Paige (N. Y.), 128; Herriman *v.* Skilman, 33 Barb. (N. Y.) 378; Van Mater *v.* Eley, 12 N. J. Eq. 271; Thayer *v.* Daniels, 113 Mass. 129; Bruner's Appeal, 7 Watts & Serg. (Penn.) 269; McCormick's Appeal, 57 Penn. St. 54; Newbold *v.* Newbold, 1 Del. Ch. 310; Post *v.* Mackall, 3 Bland (Md.), 486; General Ins. Co. *v.* United States Ins. Co., 10 Md. 517; Jones *v.* Zollicoffer, 2 Hawks (Nor. Car.), 623; Behn *v.* Young, 21 Ga. 207; Calloway *v.* People's Bank, 54 Ga. 572; Wolf *v.* Smith, 36 Iowa, 454; United States *v.* Duncan, 12 Ills. 523; Morrison *v.* Kurtz, 15 Ills. 193; Sweet *v.* Redhead, 76 Ills. 374; Logan *v.* Anderson, 18 B. Mon. (Ky.) 114; Cannon *v.* Kreip, 14 Kans. 324.

[2] Sauthoff, *in re*, 14 N. B. R. 364; Jervis *v.* Smith, 7 Abbott Pr. N. S. (N. Y.) 217; Slater *v.* Breese, 36 Mich. 77; Clark *v.* Wright, 24 So. Car. 526.

[3] Wallis *v.* Woodyear, 2 Jur. N. S. 179; Pennock *v.* Hoover, 5 Rawle (Penn.), 391; Detroit Savings Bank *v.* Truesdail, 38 Mich. 430; Gillians *v.* McCormack, 85 Tenn. 597; Rogers *v.* Blum, 56 Tex. 1.

[4] United States *v.* Duncan, 4 McLean, C. C. 607.

[5] Barnwell *v.* Wofford, 67 Ga. 50; Coker *v.* Shropshire, 59 Ala. 542; Mason's Appeal, 89 Penn. St. 402; Briggs *v.* Planters' Bank, 1 Freem. Ch. (Miss.) 574; Trapnall *v.* Richardson, 13 Ark. 543.

[6] Walker *v.* Covar, 2 So. Car. 16; Moore *v.* Wright, 14 Rich. Eq. (So. Car.) 132, 134; Austin *v.* Bowman, 81 Iowa, 277; Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458; Rogers *v.* Holyoke, 14 Minn. 220; Kidder *v.* Page, 48 N. H. 380.

[7] Wolf *v.* Smith, 36 Iowa, 454.

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[1] Emmons *v.* Bradley, 56 Maine, 333.

[2] Simmons Hardware Co. *v.* Brokaw, 7 Nebraska, 405.

[3] Morton *v.* Grafflin, 68 Md. 545; Denham *v.* Williams, 39 Ga. 312.

[4] Moss's Estate, 138 Penn. St. 646.

[5] Cockerell *v.* Dickens, 3 Moo. P. C. 98.

[6] Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458.

[7] Washburn *v.* Hammond, 151 Mass. 132, 139, *et seq.*

[8] Kendig *v.* Landis, 135 Penn. St. 612; Moss's Estate, 138 Penn. St. 646.

§ 64. **Where One of the Two Funds is itself subject to Prior Incumbrances.** — A creditor who holds security upon two tracts of land, one of which is the debtor's homestead, cannot except by reason of special equities[2] be compelled by another creditor holding a junior security upon the tract which is not a homestead to resort first for the satisfaction of his demand to the homestead, so as to leave the other tract, so far as may be, for the second creditor,[3] and the prior creditor's subsequent purchase of the homestead will not affect his rights.[4] But the creation of the homestead after that of the incumbrances will not affect the rights of the junior creditor.[5] And if the prior creditor had chosen to resort first to the homestead, or even to release the other land and then come upon the homestead, the debtor could not have complained;[6] there is no implied obligation on the holder of a mortgage which covers both a homestead and other property to exhaust first his remedy against the other property,[7] for the equitable rule that a creditor who has a lien upon two funds, upon one of which another creditor has a subsequent lien only, will be required to satisfy his claim primarily out of that fund on which the latter has no lien, has no application as between debtor and creditor;[8] it avails only as be-

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[1] King *v.* McVickar, 3 Sandf. Ch. (N. Y.) 192; Reigle *v.* Leiter, 8 Md. 405; Dunn *v.* Olney, 14 Penn. St. 219.

[2] Hodges *v.* Hickey, 67 Miss. 715.

[3] Wilson *v.* Patton, 87 Nor. Car. 318; Shell *v.* Young, 32 So. Car. 462; Armitage *v.* Toll, 64 Mich. 412; McArthur *v.* Martin, 23 Minn. 74; Mitchelson *v.* Smith, 28 Neb. 583; McCreery *v.* Shaffer, 26 Neb. 173; White *v.* Fulghum, 87 Tenn. 281; Dickson *v.* Chorn, 6 Iowa, 19; Smith *v.* Wait, 39 Wisc. 512; Marr *v.* Lewis, 31 Ark. 203. *Contra*, in part, State Bank *v.* Harlin, 18 So. Car. 425.

[4] Linscott *v.* Lamart, 46 Iowa, 312; Raber *v.* Gund, 110 Ills. 581.

[5] Abbott *v.* Powell, 6 Sawyer, C. C. 91; Bowen *v.* Barksdale, 33 So. Car. 142.

[6] Albright *v.* Albright, 88 Nor. Car. 238; Creath *v.* Creath, 86 Tenn. 659; Vaughn *v.* Powell, 65 Miss. 401.

[7] Chapman *v.* Lester, 12 Kans. 592; De Negre *v.* Haun, 14 Iowa, 240; White *v.* Polleys, 20 Wisc. 503; Tuttle *v.* Howe, 14 Minn. 145; Worcester's Estate, 60 Vt. 420.

[8] Binns *v.* Nichols, L. R. 2 Eq. 256; McDevitt's Appeal, 70 Penn. St.

two lots of land and an assignment of five shares of stock as security for the same debt, and after giving a second mortgage of one of the lots sold his interest in the stock to other parties, the second mortgagee, although he could require the association to enforce its mortgage first upon the lot which was not subject to his charge, had no right to compel it to appropriate the stock to the payment of its debt;[1] while the principal debtor still owned the stock, it was liable to be applied upon the debt secured by the first mortgage, so as to relieve the security of the second mortgagee;[2] but the burden of this latent equity would not accompany the stock into the hands of a *bona fide* purchaser thereof for value.[3] The junior incumbrancer cannot insist that the funds shall be marshalled, when the effect of this will be to destroy the remedies or impair the rights of the purchasers or *bona fide* grantees of one or both of the funds or estates.[4]

§ 66. **Where One of the Funds is primarily liable for the Payment of Both Debts.** — There can be no subrogation for the relief of the owner of the fund which is primarily liable for both debts, the very object of subrogation being to throw the burden upon those parties or that fund upon which rests the primary liability.[5] A testator who held one estate in fee-simple and another estate in fee-tail left an annuity charged upon all his property. A judgment-creditor of the testator, whose judgment was a charge upon both estates, having obtained satisfaction mainly by exhausting the fee-simple estate, the annuitant was not allowed to marshal the securities as against the remainder-man of the fee-tail estate, so as to recoup out of the surplus proceeds of that estate the amount which had been paid to the creditor out of the fee-simple estate. "To authorize the marshalling," said the Master of the Rolls, "it is obviously necessary, not only that a claim should exist against a fund subject in common with another fund to a paramount liability, but also that those interested in that other fund should not have a right to throw that liability upon the fund of the claimant. A man's own property, in which alone his legatees can claim, must be applied to the payment of his debts, in preference to the property of another, against which the statute merely gives a remedy."[1] So, a junior firm-creditor cannot compel another firm-creditor holding a senior lien on both firm and individual property to exhaust first the latter security,[2] though the contrary was held in an early and doubtful case in Tennessee.[3]

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[1] Reilly *v.* Mayer, 12 N. J. Eq. 55.

[2] Herbert *v.* Mechanics' Building Association, 17 N. J. Eq. 497; Phillipsburg Building Association *v.* Hawk, 27 N. J. Eq. 355; Red Bank Building Association *v.* Patterson, 27 N. J. Eq. 223.

[3] Reilly *v.* Mayer, 12 N. J. Eq. 55; Mechanics' Building Association *v.* Conover, 14 N. J. Eq. 219.

[4] Barnes *v.* Racster, 1 Yo. & Co. Ch. 401; Bugden *v.* Bignold, 2 Yo. & Co. Ch. 377; Lloyd *v.* Galbraith, 32 Penn. St. 103; Green *v.* Ramage, 18 Ohio, 428; Sager *v.* Tupper, 35 Mich. 134.

[5] *Antea*, §§ 6, 11, 46. Amherst College *v.* Smith, 134 Mass. 543; Iowa Loan Co. *v.* Mowery, 67 Iowa, 113.

§ 66 *a*. **Waiver of Right of marshalling Assets.** — Though a junior incumbrancer has the right in equity to compel a senior judgment-creditor to levy on and exhaust the other property of the common debtor, before coming upon that which is bound by the junior lien,[4] yet if such junior creditor neglects to interfere and assert his right until after the property which he could hold has been sold upon the execution, this sale will not afterwards be set aside for his relief.[5] He will be taken to have waived his right to the application of the rule of two funds, unless he presses it before the prior creditor has enforced his securities,[6] and can then have only such protection as he may obtain from subrogation to the prior creditors' rights.[7] The mere neglect of the prior creditor by which his lien upon one of the funds has been lost will not, in the absence of special circumstances, accrue to the advantage of the junior claimant of the second fund.[1] The prior creditor of two funds has a right to expect a notification of the right of a junior claimant of one of the funds, if the latter desire to restrict the action of the former.[2]

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[1] Douglass *v.* Cooksey, Irish R. 2 Eq. 311.

[2] Bell *v.* Hepworth, 51 Hun (N. Y.), 616.

[3] White *v.* Dougherty, Mart. & Yerg. 309.

[4] *Antea*, § 61.

[5] Baine *v.* Williams, 10 Sm. & M. (Miss.) 113. So in Searles *v.* Jacksonville R. R. Co., 2 Woods, 621.

[6] St Joseph Manufacturing Co. *v.* Daggett, 84 Ills. 556; Turner *v.* Flinn, 67 Ala. 529.

[7] *Antea*, § 62.

§ 67. **Junior Creditor cannot claim the Benefit of a Lien established subsequently to his Own.** — One lien-creditor cannot claim to be subrogated to any security taken by another which had not become a lien when he secured his own: accordingly a subsequent mortgagee, having also taken a bond for his debt, but without a warrant to confess judgment, cannot insist that a prior mortgagee shall enter up judgment upon a bond and warrant of attorney that accompanied his mortgage, in order to throw him upon other property; nor can the subsequent mortgagee object to the waiver of a judgment, subsequently confessed upon the prior bond, though purposely withdrawn in order to make way for other judgment-creditors of the mortgagor, whose liens upon the other property are posterior in date to his lien upon the mortgaged premises.[3] And a junior creditor has no right to object to an appropriation of payments in favor of an earlier lien, so long as the security which he originally had remains undiminished.[4]

§ 68. **Creditor subrogated only to a Fund which ought to have discharged the Debt his Fund has paid.** — One fund cannot be applied to the relief of another by way of subrogation or substitution, unless it is clearly shown that the former fund was liable for the payment of the debt which the latter fund has discharged.[5] The liability of the shareholders in an insurance company being unlimited as to the general

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[1] Sandidge *v.* Graves, 1 Patt. & H. (Va.) 101.

[2] Clarke *v.* Bancroft, 13 Iowa, 320. *Postea*, § 81.

[3] Miller *v.* Jacobs, 3 Watts (Penn.), 477.

[4] Johnson's Appeal, 37 Penn. St. 268.

[5] Greenlee *v.* McDowell, 3 Jones, Eq. (Nor. Car.) 325.

the first fund. This junior creditor could not require them to pay their charges out of the second fund, and thus leave the first fund available for his benefit, because they had themselves no lien upon the second fund.[1]

§ 69. **Doctrine of Two Funds applied only if Debtors are the Same.** — This doctrine of two funds is applied only to cases in which two creditors have the same common debtor,[2] and only as between the different creditors, or others who stand among themselves in the same relation.[3] Where a creditor can hold the joint and several funds of two debtors for the payment of his demand, a court of equity will not qualify this right by limiting the liability of each debtor to one-half of the debt.[4] If the first creditor has a judgment against A. and B., and the second creditor has one against B. only, the latter cannot compel the former to restrict himself to the property of A., when it does not appear whether A. or B. ought, as between themselves, to pay the debt due to the first creditor, and no equitable rights are shown in B. to have the debt charged upon A. alone.[5] So, also, if one creditor has a lien for his demand upon the property of two separate debtors, and another creditor has a junior lien only upon the fund belonging to one of the debtors, the latter creditor cannot require the former to collect his claim wholly out of that debtor whom the latter creditor cannot reach,[6] unless it be shown that the relations between the co-debtors are such as to make it equitable that the debtor having but one creditor should pay the whole of the senior demand; for equity will not sanction a principle which, though it may be just as to the creditors, is unjust as to the debtors.[1] But if a partnership creditor has obtained payment of his demand out of the separate property of one of the partners, whom he held as a surety therefor, the separate creditors of that partner may be subrogated to the rights of the partnership creditor against the firm assets,[2] unless it should appear that the partner whose separate property had thus been taken was then indebted to the firm.[3] And the general rule that courts of equity will marshal securities only among creditors of the same debtor is subject to the exception that equity will enforce a duty on the part of one debtor to pay in exoneration of another, by subjecting first the property of the principal debtor.[4]

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[1] Webb *v.* Smith, 30 Ch. D. 192.

[2] Boone *v.* Clark, 129 Ills. 466; Carter *v.* Neal, 24 Ga. 346; Knouf's Appeal, 91 Penn. St. 78; House *v.* Thompson, 3 Head (Tenn.), 512; Saunders *v.* Cook, 22 Ind. 436; Gegner *v.* Warfield, 72 Iowa, 11.

[3] Miller *v.* Cook, 135 Ills. 190.

[4] Hoys *v.* Penn, 2 Harr. & G. (Md.) 473; Markham *v.* Calvit, 5 How. (Miss.) 427; Gammell *v.* Mulford, 53 Ga. 78; Prout *v.* Lomer, 79 Ills. 331.

[5] Kendall, *ex parte*, 17 Vesey, 314, 520; Dorr *v.* Shaw, 4 Johns. Ch. (N. Y.) 17; Lloyd *v.* Galbraith, 32 Penn. St. 103.

[6] Parker *v.* Dennie, 6 Pick. (Mass.) 227; Loudon *v.* Coleman, 62 Ga. 146.

§ 70. **Junior Creditor cannot be subrogated until Prior Creditor satisfied.** — Before one creditor can be subrogated to the rights of another, the demand of the latter must be satisfied, so that he shall be relieved from all further trouble, risk, and expense.[5] The creditor holding two funds may avail himself of either of them until he has secured his whole claim.[6] And if one creditor has got his payment from the fund which was available to another, under such circumstances as to entitle the latter to be subrogated to the former's claim against another fund, yet the latter must claim his subrogation before the rights of any assignee of that fund have accrued.[7]

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[1] Ayres *v.* Husted, 15 Conn. 504; Cannon *v.* Hudson, 6 Del. 21, & 5 Del. Ch. 112; Wise *v.* Shepherd, 13 Ills. 41.

[2] Averill *v.* Loucks, 6 Barb. (N. Y.) 470.

[3] Sterling *v.* Brightbill, 5 Watts (Penn.), 229.

[4] Hodges *v.* Hickey, 67 Miss. 715; Hall *v.* Stevenson, 19 Oreg. 153; Dorr *v.* Shaw, 4 Johns. Ch. (N. Y.) 17; Kendall, *ex parte*, 17 Vesey, 514, 520.

[5] Graff's Estate, 139 Penn. St. 69; Swigert *v.* Bank of Kentucky, 17 B. Mon. (Ky.) 268; Carter *v.* Neal, 24 Ga. 346.

[6] Quackenbush *v.* O'Hare, 129 N. Y. 485; Taylor's Appeal, 81 Penn. St. 460.

[7] Williams *v.* Washington, 1 Dev. Eq. (Nor. Car.) 137. *Antea*, § 65.

§ 71. **Application of these Principles to a Case of Several Creditors of Joint and Several Debtors.** — The Pittsburg Bank, having the first judgment against and lien on the real estate of Peter Peterson, Lewis Peterson, and James Kincaid, satisfied its judgment by selling land which was the individual property of Lewis Peterson. The Monongahela Navigation Company had the second, and William Sheer the third, judgment against and lien on the real estate of the two Petersons, but not against Kincaid or on his estate. After these judgments, William Taylor obtained three judgments against the Petersons and Kincaid, on which Thomas Dale became bail for the stay of execution, and as such paid the three judgments, after other judgments had been obtained against the Petersons and Kincaid. Among these was a judgment in favor of Sylvanus Lathrop, upon which the real estate of the Petersons and Kincaid was taken in execution and sold, as also under a prior levy upon the judgment in favor of the Pittsburg Bank. Under these circumstances it was held that the Monongahela Company was entitled to be subrogated to the rights of the bank, and to have its judgment satisfied out of the money arising from the sale; and then that William Speer was entitled to receive the residue of the money towards the satisfaction of his judgment; but that Thomas Dale could not be subrogated to the rights of the bank or receive any portion of the money, in preference to the judgment-creditors of the Petersons and Kincaid, though such judgments might be subsequent to Taylor's judgments.[1]

§ 72. **Release by Prior Creditor of Fund primarily liable to him.** — A prior creditor of two funds, who has notice of such a junior charge upon one of those funds that the junior creditor may require him to resort in the first instance to the other fund, will, by a release of the fund thus primarily liable to him, postpone his lien upon the remaining fund to that of

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[1] Lathrop's Appeal, 1 Penn. St. 512.

it away from the purchaser thereof; and that the surrender by the creditor of any such security, sufficient to have satisfied the debt, discharged the lien of the judgment upon this land in the hands of the purchaser.[1]

§ 73. **But Release of Primary Fund will not prejudice Prior Creditor if made in Good Faith and without Notice.** — If, however, the prior creditor's release of the fund primarily liable to him was made in good faith, and without knowledge of the facts which established the claim of the junior creditor, his release will not prejudice his right of precedence in the common fund over the subsequent creditor.[2] Nor will his claims upon the secondary fund be prejudiced unless his rights to the primary fund which he has chosen to abandon were clear and not seriously contested, and his remedies for obtaining its application upon his demand were reasonably efficient.[3] A settlement of a contested litigation made in good faith, whereby he receives less than its value from the primary fund, will not interfere with the prosecution of his right to the secondary fund.[3] Although a second mortgagee of part of the same property which is covered by the first mortgage may require the first mortgagee to act with reasonable diligence in enforcing and preserving his rights, yet he cannot in equity compel the latter to account for the value of property covered by his mortgage, which has without his fault been put out of his reach by the mortgagor.[4] The prior creditor's rights will not be affected by his having released one fund, if the remaining fund is amply sufficient for the payment of all the claims.[5]

§ 74. **Purchase of a Portion of an Incumbered Estate; Rights of the Purchaser.** — The purchaser of land which, in common with other land, is subject to an incumbrance, for the payment of which the other land is, or has become by his purchase, the primary fund, acquires by his purchase the right of paying off the lien or other incumbrance, and of being subrogated for his indemnity to the rights of its holder.[1] If the mortgage-debt is not to be charged primarily upon either estate, he can then require a reasonable contribution from the holders of the other land,[2] the general rule being that when the estates of two or more persons are subject to a common incumbrance, for the payment of a common debt, it is to be borne ratably by all,[3] and one who pays the whole for the benefit of all will have the right to hold all the estates thus redeemed, until the others shall reimburse him an equitable proportion of the sum which he has thus paid for their common benefit;[4] or if he has paid his proportion of the debt, and the mortgagee, having sold the other land for enough to pay the remainder, fails to enforce these sales by agreement with the owners of such other lands, the mortgagee cannot afterwards further hold his land for any balance which the other land fails to pay.[5] If, however, the primary liability for the payment of the debt rested upon the estate of him who has satisfied it, then his payment will give him no claim upon the rest of the incumbered property,[6] even though he took an assignment of the mortgage or other charge.[7]

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[1] Ingalls v. Morgan, 10 N. Y. 178.

[2] Cheeseborough v. Millard, 1 Johns. Ch. (N. Y.) 409.

[3] Kidder v. Page, 48 N. H. 380; Brown v. South Boston Savings Bank, 148 Mass. 300; Ross v. Duggan, 5 Color. 85.

[4] Shields v. Kimbrough, 64 Ala. 504.

[5] Kelly v. Whitney, 45 Wisc. 110.

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[1] Sergeant v. Rowsey, 89 Mo. 617; O'Brien v. Krenz, 36 Minn. 136; Fletcher v. Chase, 16 N. H. 38; Kilborn v. Robbins, 8 Allen (Mass.), 466; *Lowe, J.*, in Street v. Beal, 16 Iowa, 68, 70; Cheever v. Fair, 5 Calif. 337.

[2] White v. White, 9 Vesey, 554; Jones v. Jones, 5 Hare, 440; Lyman v. Little, 15 Vt. 576; Henderson v. Stewart, 4 Hawks (Nor. Car.), 256.

[3] New Jersey Sinking Fund v. Woodward, 40 N. J. Eq. 23.

[4] *Shaw, C. J.*, in Chase v. Woodbury, 6 Cush. (Mass.) 143, 146; Brown v. Worcester Bank, 8 Met. (Mass.) 47; Allen v. Clark, 17 Pick. (Mass.) 47; Salem v. Edgerly, 33 N. H. 46; Chittenden v. Barney, 1 Vt. 28; Young v. Williams, 17 Conn. 393; Skeel v. Spraker, 8 Paige (N. Y.), 182; Cheeseborough v. Millard, 1 Johns. Ch. (N. Y.) 409; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425.

[5] Jennings v. Vickers, 31 La. Ann. 679.

[6] Merritt v. Richey, 97 Ind. 236.

[7] McIntire v. Parks, 59 N. H. 258; Chase v. Woodbury, 6 Cush. (Mass.) 143; George v. Wood, 11 Allen (Mass.), 41, 42; Cushing v. Ayer, 25 Maine, 383.

§ 75. **Order of Liability of Separate Parcels of Incumbered Estate sold successively.** — When different parcels of premises, the whole of which are subject to the burden of a mortgage or other charge, are successively sold to different purchasers with warranty, the rule almost universally adopted to determine the comparative liability of the different parcels is that any portion retained by the debtor or mortgagor shall be first applied to the payment of the debt secured by the charge or mortgage,[1] and if that is not sufficient, then the other parcels shall be resorted to in the inverse order of their alienation, the parcel last sold being first applied upon the debt,[2] even though a part of the remaining land is situated in another State.[3] The first purchaser from the mortgagor has the prior equity,[4] although he did not actually pay the consideration

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[1] Savings Bank *v.* Cresswell, 100 U. S. 630; Orvis *v.* Powell, 98 U. S. 176; Dougherty *v.* Richardson, 20 Ind. 412; Edwards *v.* Applegate, 70 Ind. 325; Gantz *v.* Toles, 40 Mich. 725; Hoff's Appeal, 84 Penn. St. 40; Lowry *v.* McKinney, 68 Penn. St. 294; Raun *v.* Reynolds, 11 Calif. 14; Keirsted *v.* Avery, 4 Paige (N. Y.), 1.

[2] Holden *v.* Pike, 24 Maine, 427; Wallace *v.* Stevens, 64 Maine, 225; Bradley *v.* George, 2 Allen (Mass.), 392; Pike *v.* Goodnow, 12 Allen (Mass.), 472; Allen *v.* Clark, 17 Pick. (Mass.) 47; Sandford *v.* Hill, 46 Conn. 42; Brown *v.* Simons, 44 N. H. 475; Deavitt *v.* Judevine, 60 Vt. 695; Gates *v.* Adams, 24 Vt. 71; Lyman *v.* Lyman, 32 Vt. 79; Skeel *v.* Spraker, 8 Paige (N. Y.), 182; Kellogg *v.* Rand, 11 Paige (N. Y.), 59; Welch *v.* James, 22 How. Pr. (N. Y.) 474; Green *v.* Millbank, 3 Abbott New Cas. (N. Y.) 138; Chapman *v.* West, 17 N. Y. 125; Keene *v.* Munn, 16 N. J. Eq. 398; Dawes *v.* Cammus, 32 N. J. Eq. 456; Mount *v.* Potts, 23 N. J. Eq. 188; Sternberger *v.* Hanna, 42 Ohio St. 305; Commercial Bank *v.* Western Reserve Bank, 11 Ohio, 444; Paxton *v.* Harrier, 11 Penn. St. 312; Beddow *v.* De Witt, 43 Penn. St. 326; Jones *v.* Myrick, 8 Gratt. (Va.) 179; Schofield *v.* Cox, 8 Gratt. (Va.) 533; Norton *v.* Lewis, 3 So. Car. 25; Burton *v.* Henry, 90 Ala. 281; Hutton *v.* Lockridge, 22 W. Va. 159; Pallen *v.* Agricultural Bank, 1 Freem. (Miss.) 419; Dugger *v.* Tayloe, 60 Ala. 504; Aiken *v.* Bruen, 21 Ind. 137; McCullum *v.* Turpie, 32 Ind. 146; Lock *v.* Fulford, 52 Ills. 166; Matteson *v.* Thomas, 41 Ills. 110; State *v.* Titus, 17 Wisc. 241; Warren *v.* Foreman, 19 Wisc. 35; Aiken *v.* Milw. & St. Paul R. R. Co., 37 Wisc. 469; Sibley *v.* Baker, 23 Mich. 312; Cooper *v.* Bigley, 13 Mich. 463; Payne *v.* Avery 21 Mich. 524.

[3] Welling *v.* Ryerson, 94 N. Y. 98.

[4] Van Slyke *v.* Van Loan, 26 Hun (N. Y.), 344; Ellison *v.* Pecare, 29 Barb. (N. Y.) 333; Edge *v.* Goulard, 36 N. J. Eq. 43; Horning's Appeal, 90 Penn. St. 388; Miller *v.* Rogers, 49 Tex. 398.

erty, and on an examination directed to this other property disclose the additional fact that a conveyance of this latter property has been made which gives an equitable right to the grantee thereof to throw the burden of the incumbrance upon the first property, the intending purchaser must be presumed to have made such examination, and accordingly to have had notice of such equitable right.[1] Successive mortgages, to the extent of the interest which they create, are regarded like other conveyances.[2] But this rule has no application to a case in which successive conveyances of different parcels of the mortgaged property have been made to the same purchaser;[3] nor will it be extended to cover successive sales of undivided interests in the same property,[4] nor so as to cover any case in which its enforcement would be prejudicial to the creditor.[5] And the request for its application must be made before the foreclosure is completed.[6] The same rule has been applied for the protection of a purchaser from the mortgagor of one of several mortgaged chattels by compelling the mortgagee to resort for his payment first to the chattels retained by the mortgagor.[7]

§ 76. **Rule in Iowa and Kentucky.** — But this rule of applying upon the mortgage such portions of the mortgaged property as have been conveyed by the mortgagor in the inverse order of their alienation has not been followed in Iowa and Kentucky. In Iowa it is held that where portions of the mortgaged property have been sold and conveyed subsequently to the mortgage, and the mortgagor retains the remaining part, the portion which remains unsold should indeed be first subjected to the payment of the mortgage-debt;[1] for although the mortgage is a lien resting upon all the estate alike, yet the mortgagor, in addition to the legal obligations resulting from the stipulations in his mortgage-deed, and from the covenants in his deed to his grantee, is morally bound to pay the debt and to clear away any incumbrance from the property which he has sold; but that, as between the grantees who have purchased different parcels of the incumbered estate from the mortgagor at different times, there is no greater moral obligation to pay the debt resting upon one than upon the other; and accordingly the subsequent purchasers of the different portions of the mortgaged premises must contribute ratably to the discharge of the incumbrance.[2] The same doctrine is maintained in Kentucky.[3] And it has been held in Georgia that the purchasers of parts of the mortgaged property from the mortgagor cannot compel the mortgagee to resort for the payment of his debt to that part of the mortgaged property which remains in the possession of the mortgagor;[4] though their rights against the debtor and against incumbrancers junior to themselves are recognized.[5]

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[1] Hunt *v.* Mansfield, 31 Conn. 488; Iglehart *v.* Crane, 42 Ills. 261.

[2] Schryver *v.* Fuller, 9 Paige (N. Y.), 173; Thomas *v.* Moravia Foundry Co., 43 Hun (N. Y.), 487; Converse *v.* Ware Savings Bank, 152 Mass. 407; Millsaps *v.* Bond, 64 Mississippi, 453; Fassett *v.* Mulock, 5 Colorado, 466.

[3] Steere *v.* Childs, 15 Hun (N. Y.), 511.

[4] Cashman *v.* Martin, 50 How. Pr. (N. Y.) 337.

[5] Pancoast *v.* Duval, 26 N. J. Eq. 445; Cashman *v.* Martin, 50 How. Pr. (N. Y.) 337; Francis *v.* Herren, 101 Nor. Car. 497; Jackson *v.* Sloan, 76 Nor. Car. 306.

[6] St. Joseph Manufacturing Co. *v.* Daggett, 84 Ills. 556.

[7] High *v.* Brown, 46 Iowa, 259; Lee *v.* Buck, 13 So. Car. 178.

§ 77. **No Distinction between Mortgage and Judgment-lien or other Incumbrance.** — A distinction has sometimes been made between the lien of a judgment or attachment and that of a mortgage. It was decided in Virginia that where a judgment has been recovered against a debtor which is a lien upon his real estate, and he subsequently conveys his lands by separate conveyances made at various times in different parcels to different grantees, all the debtor's lands in the hands of these respective grantees are alike liable to the creditor, and must contribute to satisfy the judgment *pro rata*, and not in the inverse order of their alienation;[1] but doubt was speedily thrown upon this decision by the same court which had rendered it,[2] and it has since been expressly overruled.[3] And in Tennessee it has been held that the several purchasers of different tracts of land from one whose real estate is all subject to the lien of an execution are mere strangers to each other; and if some of these purchasers afterwards lose their lands by having them sold on the execution, they have no right either of indemnity or contribution against the others, and no remedy against the grantor, if their purchases were by deed and without fraud or warranty.[4] But the great mass of the cases put the incumbrance of a judgment upon exactly the same ground as any other incumbrance, as to its effects upon the rights of subsequent purchasers of parts of the incumbered premises.[5] The same rule will be applied to a devise of lands charged with the payment of legacies: portions of the lands which have been conveyed by the devisee at different times will be charged

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[1] Mickley *v.* Tomlinson, 79 Iowa, 383; Dilger *v.* Palmer, 60 Iowa, 117; Taylor *v.* Short, 27 Iowa, 361.

[2] Huff *v.* Farwell, 67 Iowa, 298; Barney *v.* Meyers, 28 Iowa, 472; Griffith *v.* Lovell, 26 Iowa, 226; Massie *v.* Wilson, 16 Iowa, 390; Bates *v.* Ruddick, 2 Iowa, 423.

[3] Dickey *v.* Thompson, 8 B. Mon. (Ky.) 312; Beall *v.* Barclay, 10 B. Mon. (Ky.) 261; Morrison *v.* Beckwith, 4 T. B. Mon. (Ky.) 73; Blight *v.* Banks, 6 *Id.* 192.

[4] Knowles *v.* Lawton, 18 Ga. 476.

[5] Craigmales *v.* Gamble, 85 Ga. 439; Manley *v.* Ayers, 68 Ga. 507.

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[1] Beverley *v.* Brooke, 2 Leigh (Va.), 426.

[2] Conrad *v.* Harrison, 3 Leigh (Va.), 532.

[3] McLung *v.* Beirne, 10 Leigh (Va.), 394; Henkle *v.* Allstadt, 4 Gratt. (Va.) 284; Rodgers *v.* McCluer, 4 Gratt. (Va.) 81; Brengle *v.* Richardson, 78 Va. 406.

[4] Jobe *v.* O'Brien, 2 Humph. (Tenn.) 34.

[5] National Savings Bank *v.* Cresswell, 100 U. S. 630; Hunt *v.* Mansfield, 31 Conn. 488; Pallen *v.* Agricultural Bank, 1 Freem. (Miss.) 419; Welch *v.* James, 22 How. Pr. (N. Y.) 474; Clowes *v.* Dickinson, 5 Johns. Ch. (N. Y.) 235; s. c., on appeal, 9 Cow. (N. Y.) 403; Barnes *v.* Mott, 64 N. Y. 397; Ingalls *v.* Morgan, 10 N. Y. 178; Howard Ins. Co. *v.* Halsey, 8 N. Y. 271; James *v.* Hubbard, 1 Paige (N. Y), 228; Taylor *v.* Maris, 5 Rawle (Penn.) 51; Nailer *v.* Stanley, 10 Serg. & R. (Penn.) 450; Ebenhardt's Appeal, 8 Watts & Serg. (Penn.) 327; Cowden's Estate, 1 Penn. St. 267; Edwards *v.* Applegate, 70 Ind. 325; Russell *v.* Houston, 5 Ind. 180; Fowler *v.* Barksdale, 1 Harp. Eq. (So. Car.) 164; Relfe *v.* Bibb, 43 Ala. 519; Hunt *v.* Ewing, 12 Lea (Tenn.), 519.

for its proportionate value;[1] but this would not be so, if it was shown that the mortgagor had no title to the lot released, so that the subsequent grantees of the mortgagor could be in no way prejudiced by the release.[2] Nor will the release of a part of the mortgaged premises from the lien of the mortgage in any manner affect that lien upon the residue of the premises, as between the original parties; so far as their rights are concerned, every part of the mortgaged premises is bound for the payment of the whole debt.[3] The release of the primary fund will exonerate *pro tanto* the secondary fund in the hands of one who has purchased the latter since the creation of the lien,[4] although the release contained an express reservation of all rights against such purchaser.[5] If a mortgagee, having notice of a subsequent mortgage upon a portion of the same land, releases that portion upon which he has an exclusive lien, and which was of sufficient value to have satisfied his whole claim, the court, upon a foreclosure sale of the remainder of the premises, will postpone his claim to that of the subsequent mortgagee.[6] Such a junior incumbrancer has an equitable right to have the property which is not included in his security, but is subject to the prior lien, first applied to the satisfaction of that prior lien to the relief of his security.[7] The purchaser for value and with warranty of incumbered lands and his grantees occupy a position similar to that of sureties for the debtor, and are entitled to the same

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v. Williams, 4 Minn. 260; Carey *v.* Boyle, 53 Wisc. 574; Jones *v.* Maney, 7 Lea (Tenn.), 341; Warner *v.* De Witt County Bank, 4 Ills. App. 305.

[1] Wolf *v.* Smith, 36 Iowa, 454; Birnie *v.* Main, 29 Ark. 591; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y) 425.

[2] Taylor *v.* Short, 27 Iowa, 361; Van Orden *v.* Johnson, 14 N. J. Eq. 376.

[3] Coutant *v.* Servoss, 3 Barb. (N. Y.) 128.

[4] Martin's Appeal, 97 Penn. St. 85; McVeigh *v.* Sherwood, 47 Mich. 545; Ford *v.* Geauga County, 7 Ohio (part 2), 143; Leffingwell *v.* Freyer, 21 Wisc. 392; Moore *v.* Trimmier, 32 So. Car. 511.

[5] Dugger *v.* Tayloe, 60 Ala. 504.

[6] Deuster *v.* McCamus, 14 Wisc. 307; Alsop *v.* Hutchings, 25 Ind. 347.

[7] Schofield *v.* Cox, 8 Gratt. (Va.) 533; Mickle *v.* Rambo, 1 N. J. Eq. 501; Baring *v.* Moore, 4 Paige (N. Y.), 166.

equities as sureties would be. A release by the creditor without their consent, and with knowledge of their rights, of any security to which they would be entitled on payment of the debt, discharges *pro tanto* the lien on their property.[1]

§ 79. **Release of Estate primarily liable will not exonerate Estate secondarily liable unless in Justice it ought to have that Effect.** — But the rule of charging different parcels of land which are subject to a common incumbrance in the inverse order of their alienation by the debtor being a mere rule of equity,[2] and a release to a subsequent purchaser of one parcel of the land not being a technical discharge of the parcels previously conveyed from the lien of the incumbrance, it will be treated as an equitable release only in those cases in which, according to natural justice and equity, it ought so to operate against the one giving the release.[3] If the full value of what is primarily liable is realized upon the debt, that is all that can be asked by those interested in the other parcels.[4] Thus where a mortgagor, having sold and conveyed a part of the mortgaged premises and received full payment therefor, afterwards sells the remainder of the premises to another purchaser for their full value, with the agreement that all the purchase-money shall be applied upon the mortgage-debt, and the premises thus be relieved from the lien of the mortgage, the mortgagee will not, by receiving the value of this remainder from the second purchaser, and thereupon releasing the land of the latter from the mortgage, discharge wholly or in part the portion conveyed to the first purchaser from the lien of the mortgage for the balance of the debt; the full value of the second purchase having been applied upon the mortgage-debt, the first purchaser has enjoyed all his rights;[1] and the mortgagee has not the equitable right further to hold the second tract, of which he has thus once received the full value;[2] if he could hold it, it would be only upon refunding the amount so paid.[3] It has been held that if a mortgagor sells a portion of an estate which is incumbered by a mortgage to secure the payment of various debts, to a purchaser who has only constructive notice of the mortgage, and transfers the notes given by such purchaser for the purchase-money to one of the mortgage-creditors to be applied upon one of the mortgage-debts, the purchaser's payment of these notes to one of the mortgage-creditors does not release the land thus purchased from the lien of the mortgage, unless it was so agreed between the purchaser and the mortgagees.[4] A prior purchaser from the debtor who has not yet paid all his purchase-money must, to the extent of the unpaid purchase-money,[5] contribute to the relief of a subsequent purchaser who has been compelled to pay a common incumbrance, although the latter had agreed with his grantor, the original debtor, to pay the amount due upon the common lien out of his purchase-money, if the subsequent purchaser made this agreement in consequence of fraudulent misrepresentations of his grantor as to the amount of the incumbrance.[6] If, after the original incumbrance, the debtor first gave a mortgage upon part of the incumbered premises, which has not been foreclosed, and subsequently gave an absolute deed of the residue to another party, then, the origi-

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[1] Coffin *v.* Parker, 127 N. Y. 117; Barnes *v.* Motte, 64 N. Y. 397; Ingalls *v.* Morgan, 10 N. Y. 178; Hicks *v.* Bingham, 11 Mass. 300.

[2] Francis *v.* Herren, 101 Nor. Car. 497; Aderholt *v.* Henry, 87 Ala. 415; Fleishel *v.* House, 52 Ga. 60; Hawhe *v.* Snydaker, 86 Ills. 197; Worth *v.* Hill, 14 Wisc. 559.

[3] Libby *v.* Tufts, 121 N. Y. 172; Kendall *v.* Woodruff, 87 N. Y. 1; Kendall *v.* Niebuhr, 58 How. Pr. (N. Y.) 156; s. c. 45 N. Y. Superior Ct. 542; Torrey *v.* Cook, 116 Mass. 163; Clark *v.* Fontain, 135 Mass. 464; Bradley *v.* Fuller, 23 Pick. (Mass.) 1; Williams *v.* Brown, 57 Ga. 304.

[4] Santa Marina *v.* Connolly, 79 Calif. 517.

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[1] Patty *v.* Pease, 8 Paige (N. Y.), 277; Hawke *v.* Snydaker, 86 Ills. 197.

[2] Pearson *v.* Carr, 94 Nor. Car. 567.

[3] Browne *v.* Davis, 109 Nor. Car. 23.

[4] Colby *v.* Cato, 47 Ala. 247.

[5] Baldwin *v.* Sager, 70 Ills. 503.

[6] Beddow *v.* DeWitt, 43 Penn. St. 326.

conveyance by the mortgagor to a purchaser of part of the mortgaged premises, who has acquired by his purchase the right to throw the burden of the incumbrance upon the mortgagor and upon the residue of the mortgaged property in his hands, this will discharge the land of such purchaser from its liability under the mortgage, even though at the time of such release the payment of the mortgage-debt was assumed by another person, the purchaser not having assented to this substitution.[1]

§ 81. **Prior Incumbrancer not affected by Subsequent Alienations of the Premises unless notified of them.**— Before the holder of a mortgage or other incumbrance upon property can be required to act in collecting his demand with reference to the order of subsequent alienations of portions of the incumbered property, he must have notice of what that order is,[2] other than the mere constructive notice derived from the registry of the deeds given subsequently to his mortgage,[3] unless special circumstances have made it his duty to examine the records.[4] He is not bound to take notice of subsequent liens or conveyances, or of litigation which arises concerning them;[5] and subsequent purchasers of portions of the mortgaged premises who desire him to act with reference to the order of subsequent alienations by the mortgagor must notify him of the facts in proper time, and request him to act accordingly.[6] They cannot remain passive until after a foreclosure has been completed, and then set up against the mortgagee facts of which the latter had no knowledge.[1] A second mortgagee or a purchaser from the mortgagor can have the benefit of a release given by the first mortgagee only where the first mortgagee gave the release with notice of the second incumbrance or conveyance.[2] If the release was given without notice of the equities of the subsequent incumbrancer or grantee, the first mortgagee who gave it is not responsible for the consequences of his act, nor is the lien of his mortgage upon the unreleased portion of the premises in any wise impaired thereby.[3] But if a mortgagee, before giving a partial release of his mortgage, employs an attorney to examine the title to the mortgaged property, the mortgagee is chargeable with notice of all the conveyances thereof found by such attorney upon record, although they have not been communicated by the attorney to him.[4] Actual notice is not necessary in such cases; knowledge of facts which impose the duty of inquiring before acting is sufficient;[5] but the mere possession of a subsequent grantee is not sufficient,[6] unless the prior mortgagee also knows who has such possession and its character.[7]

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[1] Coyle *v.* Davis, 20 Wisc. 564.

[2] Patty *v.* Pease, 8 Paige (N. Y.), 277; La Farge Ins. Co. *v.* Bell, 22 Barb. (N. Y.) 54; Robinson *v.* Sherman, 2 Gratt. (Va.) 178; Boone *v.* Clark, 129 Ills. 466; Sarles *v.* McGee, 1 Nor. Dak. 365; James *v.* Brown, 11 Mich. 25.

[3] George *v.* Wood, 9 Allen (Mass.), 80; Wheelright *v.* De Peyster, 4 Edw. Ch. (N. Y.) 232; Hoy *v.* Bramhall, 19 N. J. Eq. 74 and 563; Mark *v.* Speck, 133 Penn. St. 27; Birnie *v.* Main, 29 Ark. 591; Straight *v.* Harris, 14 Wisc. 509; Hosmer *v.* Campbell, 98 Ills. 572.

[4] Alexander *v.* Welch, 10 Ills. Ap. 181.

[5] Lewis *v.* Hinman, 56 Conn. 55; Uniontown Building Association's Appeal, 92 Penn. St. 200; Stuyvesant *v.* Hone, 1 Sandf. Ch. (N. Y.) 419; Ward *v.* Hague, 25 N. J. Eq. 397; Meier *v.* Meier, 105 Mo. 412.

[6] Snyder *v.* Crawford, 98 Penn. St. 414; Horning's Appeal, 90 Penn. St.

§ 82. **The Mortgagor may by Stipulation vary the Order of Liability.**—If the owner of incumbered premises, in conveying different parcels thereof, fixes in his conveyances the order of primary liability for the payment of the whole or a part[8]

388; McIlvain *v.* Mutual Assurance Co., 93 Penn. St. 30; Iglehart *v.* Crane, 42 Ills. 261; King *v.* Mc Vickar, 3 Sandf. Ch. (N. Y.) 192; Lausman *v.* Drahos, 8 Neb. 457.

[1] Richey *v.* Merritt, 108 Ind. 347; McAfee *v.* McAfee, 28 So. Car. 218; Matteson *v.* Thomas, 41 Ills. 110; Blair *v.* Ward, 10 N. J. Eq. 119.

[2] McIlvain *v.* Mutual Assurance Co., 93 Penn. St. 30; Johnson *v.* Bell, 58 N. H. 395; Powell *v.* Hayes, 31 La. Ann. 789.

[3] Vanorden *v.* Johnson, 14 N. J. Eq. 376; Taylor *v.* Maris, 5 Rawle (Penn.), 51; Guion *v.* Knapp, 6 Paige (N. Y.), 35; Holman *v.* Norfolk Bank, 12 Ala. 369.

[4] Kendall *v.* Niebuhr, 58 How. Pr. (N. Y.) 156; s. c. 45 N. Y. Superior Court, 542.

[5] Hall *v.* Edwards, 43 Mich. 473.

[6] Coggswell *v.* Stout, 32 N. J. Eq. 240.

[7] Dewey *v.* Ingersoll, 42 Mich. 17.

[8] Ellis *v.* Johnson, 96 Ind. 377.

of the incumbrance, then this order will follow the different parcels in subsequent conveyances thereof,[1] even if one parcel comes to the hands of the mortgagee himself.[2] Accordingly, if the owner of mortgaged land conveys a portion thereof, of more than sufficient value to pay the mortgage-debt, with a provision in the deed that the purchaser is to assume and pay the whole of the mortgage, and afterwards conveys the remainder of the land with the understanding that the mortgage is to be paid off by the former purchaser, and the mortgagee subsequently takes another mortgage upon the portion first conveyed, with notice of the facts, the purchaser of the second lot may maintain a bill in equity to redeem the same without contribution towards the payment of the debt secured by the first mortgage. The contract of the mortgagor is binding upon the land in the hands of any subsequent purchaser who acquires his title with knowledge of his grantor's agreement.[3] And a grantee who has in his deed assumed and agreed to pay a certain amount of a mortgage upon the premises which he has purchased cannot afterwards contest the question of the amount which is due upon that mortgage, so long as he is not called upon to pay more than the sum which he has thus assumed.[4] The prior grantee of a portion of incumbered premises whose grant is expressly made subject to the incumbrance must, for the relief of subsequent grantees of the property, contribute ratably with

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[1] Hoy *v.* Bramhall, 19 N. J Eq. 74 and 563; Mayo *v.* Merrick, 127 Mass. 511; Stevens *v.* Goodenough, 26 Vt. 676; Bowne *v.* Lynde, 91 N. Y. 92; Harlem Savings Bank *v.* Mickleburgh, 57 How. Pr. (N. Y.) 106; Zabriskie *v.* Salter, 80 N. Y. 555; Torrey *v.* Orleans Bank, 9 Paige (N. Y.), 649; Atwood *v.* Vincent, 17 Conn. 575; Engle *v.* Haines, 1 Halst. (5 N. J. Eq.) 186; s. c., on appeal, *nom.* Ross *v.* Haines, *Id.* 632; Caruthers *v.* Hall, 10 Mich. 40; McCloskey *v.* O'Brien, 16 W. Va. 791; Moore *v.* Shurtleff, 128 Ills. 370; Briscoe *v.* Power, 47 Ills. 447.

[2] Sanford *v.* Van Arsdall, 53 Hun (N. Y.), 70.

[3] Welch *v.* Beers, 8 Allen (Mass.), 151; Johnson *v.* Walter, 60 Iowa, 315; Miller *v.* Fasler, 42 Minn. 366; Burger *v.* Greif, 55 Md. 518.

[4] Ritter *v.* Phillips, 53 N. Y. 586; Wilcox *v.* Campbell, 106 N. Y. 325.

sale under the judgment, and parts of these lands have previously been sold by the debtor, and there are other lands of the debtor unsold, but the judgment-lien upon these latter lands would expire before they could be advertised and sold, the owner of the judgment will not be bound, at the request of the purchaser from the debtor, to abandon the sale of the lands which he has advertised. The purchaser's remedy would be to offer to pay the judgment, and then, by his bill in equity against all parties in interest before the expiration of the lien of the judgment, to enforce his equitable rights to contribution and indemnity.[1] After such a tender, the owner of the judgment would have no right to proceed with his levy and sale.[2] If the purchaser's land is sold upon the judgment, he can compel one who purchased from the debtor subsequently to himself to indemnify him, to the extent of the value of the lands of such subsequent purchaser.[3] The purchaser who has not seasonably enforced his right to the proper order of sale can protect his rights only by redeeming from the prior incumbrance, and holding by subrogation the parcels that are primarily liable.[4] A purchaser from the debtor or mortgagor of part of the incumbered premises cannot, against the will of the creditor, redeem his property alone from the incumbrance; he must pay the whole debt.[5] But if the mortgagee or holder of the lien himself becomes, with notice, the owner of the property which is primarily liable for the payment of the debt, and is of sufficient value therefor, then such a purchaser may redeem his property from the incumbrance without paying any portion of the debt.[1] The purchaser of land at a tax-sale acquires no such equitable right as a grantee with warranty, and cannot compel a mortgagee to resort first to the mortgagor's remaining land.[2]

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[1] James *v.* Hubbard, 1 Paige (N. Y.), 228. See also Dobbins *v.* Wilson, 107 Ills. 17.

[2] Welch *v.* James, 22 How. Pr. (N. Y.) 474.

[3] Clowes *v.* Dickinson, 5 Johns. Ch. (N. Y.) 235; s. c., on appeal, 9 Cow. (N. Y.) 403; James *v.* Hubbard, 1 Paige (N. Y.), 228.

[4] Case *v.* O'Brien, 66 Mich. 289; Long *v.* Kaiser, 81 Mich. 518; Quackenbush *v.* O'Hare, 61 Hun (N. Y.), 388.

[5] Andreas *v.* Hubbard, 50 Conn. 351; Carnes *v.* Platt, 59 N. Y. 405; Street *v.* Beal, 16 Iowa, 68; North western Co. *v.* Randolph, 47 Kans. 420.

§ 84. **Instances of the Application of these Rules.** — After three pieces of land had been attached by a creditor of their owner, the debtor sold and conveyed one of the pieces for value, and afterwards mortgaged the two remaining pieces, the grantees in these conveyances having no actual knowledge of the attachment. The attaching creditor then recovered judgment, and the mortgagees purchased this judgment, and levied it upon the piece first conveyed, refusing to levy upon the other pieces, which were sufficient to satisfy their judgment; and it was held that the first grantee acquired by his purchase an equitable right against the debtor to have the other pieces first applied to the satisfaction of the judgment; that the debtor's subsequent mortgagees of the remaining pieces took their mortgage subject to the same equitable burden;[3] and accordingly that their purchase of the judgment did not give them the right to levy their execution on the piece first sold, so long as the other pieces were sufficient to satisfy it.[4] The creditor of a mortgagor levied an execution upon the equity of redemption, and had an undivided share thereof set off to himself in satisfaction of his judgment. The debtor then gave a second mortgage of his interest in the equity of redemption, which was foreclosed. The first mortgagee then obtained a decree of foreclosure against the other creditors, the time limited to the judgment-creditor to redeem being a week later than that limited to the second mortgagee. A stranger, at the instance of the second mortgagee, paid off the first mortgagee, and took for his security an assignment of the first mortgage-debt and a conveyance of all the second mortgagee's interest in the premises. After this payment, and before the expiration of the time limited for the judgment-creditor to redeem, the judgment-creditor tendered to this stranger the amount so paid by him, and demanded a release of his interest in the premises, which was refused. The court held that the judgment-creditor had acquired by his levy an indefeasible interest in his share of the equity of redemption, with the right, as against the rest of the land, to perfect his title by paying a corresponding share of the debt secured by the first mortgage; that the second mortgagee, by the foreclosure of his mortgage, became the owner of the residue of the equity, with a like right to redeem his share; and that the judgment-creditor and the second mortgagee thus became tenants in common of the equity of redemption, each owning an undivided share thereof, and each bound to pay a proportionate share of the prior incumbrance; and that the stranger, having, in behalf of one of them, paid the whole of the prior incumbrance, could now call upon the other to contribute his proportional share thereof, or to be foreclosed of his interest in the equity of redemption.[1] C. sold fifty acres of land, and took from the purchaser a mortgage for $870 of the purchase-money, and afterwards purchased a farm from K., and mortgaged it back for the purchase-money, and as a further security assigned to K. the mortgage upon the fifty acres; and both of these mortgages were afterwards assigned by K. to J., in payment of a debt. C. then sold and conveyed the farm with warranty; and the farm subsequently came by mesne conveyances to S. J. then obtained a decree to foreclose the mortgage upon the fifty acres; and C. afterwards repurchased the fifty acres, and agreed with the mortgagor to satisfy this decree of foreclosure, but failed to do so, and afterwards conveyed the fifty

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[1] Bradley *v.* George, 2 Allen (Mass.), 392; Meacham *v.* Steele, 93 Ills. 135.

[2] Miller *v.* Cook, 135 Ills. 190.

[3] As in Acquackanonk Water Co. *v.* Manhattan Ins. Co., 36 N. J. Eq. 586.

[4] Hunt *v.* Mansfield, 31 Conn. 488.

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[1] Young *v.* Williams, 17 Conn. 393. See also Mallory *v.* Hitchcock, 29 Conn. 127.

A railroad company having taken for the construction of its road the title to a portion of a piece of land, upon which there was a prior mortgage, of which it had constructive notice, it was held, upon a foreclosure of the mortgage and a sale in parcels of the whole of the mortgaged premises, that the company was bound to contribute to the payment of the mortgage-debt, if the same were not paid by the sale in the inverse order of alienation of the other property covered by the mortgage, the full value of the land which it had taken as of the time of the taking, with interest to the time of payment; so that the railroad company was in effect allowed to redeem its land from the mortgage-lien by paying a ratable proportion of the mortgage-debt, to the extent of the full value of the land at the time of their taking it with interest.[1] The owner of two tracts of land, having given a mortgage of both tracts, sold one of the tracts to a purchaser, who, by the terms of his deed, assumed the payment of the whole mortgage-debt, and also gave a mortgage back to his grantor, conditioned to save him harmless from the original mortgage. This purchaser afterwards sold his tract to other vendees, the amount of the debt due upon the original mortgage being deducted from the price. This tract was held to have become by these conveyances the primary fund for the payment of the mortgage; nor did it cease to be such because the original owner afterwards agreed to discharge his mortgage; for that was a mere personal security to himself.[2]

§ 85. **When the Purchaser of an Equity of Redemption assumes the Payment of the Mortgage.** — It is generally held that an agreement by the purchaser of an equity of redemp-

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(Va.), 532. So in Sibley v Baker, 23 Mich. 312. See also Bernhardt v. Lymburner, 85 N. Y. 172.

[1] Dows v. Congdon, 16 How. Pr. (N. Y.) 571. So in Foster v. Union Bank, 34 N. J. Eq. 48. See also Boraem v. Wood, 27 N. J. Eq. 371; Mutual Ins. Co. v. Easton & Amboy R. R. Co., 38 Id. 132.

[2] State v. Ripley, 32 Conn. 150.

tion with his vendor that he will himself assume and pay the mortgage-debt will render him personally liable, not only to his grantor but also directly to the holder of the mortgage,[1] and that without affecting the liability of the original debtor.[2] The original doctrine, which is still often supported, was that this right of the mortgagee to hold the purchaser of the equity of redemption by reason of the latter's agreement with the mortgagor to assume the payment of the mortgage-debt, does not mean that the mortgagee can maintain an action at law upon this agreement between the mortgagor and the purchaser, but rests on the ground that the contract of the purchaser is a collateral stipulation obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee.[3] The mortgagee is said to stand on the rights of his debtor,[1] and to be entitled to appropriate for his debt any security held by his debtor for its payment;[2] and his remedy is restricted to the privilege of subrogation to the rights of his debtor,[3] and will give him no rights against the purchaser which could not under the contract of purchase have been claimed by the original debtor.[4] Accordingly the mortgagee has been allowed to enforce the personal liability of such a purchaser only to the extent of the deficiency upon a foreclosure sale of the mortgaged premises,[5] and only if the party to whom the purchaser's agreement was given was himself personally liable for the payment of the mortgage-debt.[6] The doctrine of equity is that, when the grantee in a deed assumes the payment of the mortgage-debt, he is to be regarded as the principal debtor, and the mortgagor occupies the position of a surety;[7] and the mortgagee is permitted to resort to this grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, by the equitable rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation,[8] though this right is strictly an equitable one, and its exercise at law has been refused.[9] But the broad doctrine has since been laid down,

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[1] Union Ins. Co. *v.* Hanford, 143 U. S. 187; Twichell *v.* Mears, 8 Biss. C. C. 211; Bowen *v.* Beck, 94 N. Y. 86; Ricard *v.* Sanderson, 41 N. Y. 179; Burr *v.* Beers, 24 N. Y. 178; Vrooman *v.* Turner, 8 Hun (N. Y.), 78; Thorp *v.* Keokuk Coal Co., 48 N. Y. 253; Dunning *v.* Leavitt, 85 N. Y. 30, reversing Dunning *v.* Fisher, 20 Hun (N. Y.), 178; Campbell *v.* Smith, 8 Hun (N. Y.), 6; Lamb *v.* Tucker, 42 Iowa, 118; Thompson *v.* Bertram, 14 Iowa, 476; Moses *v.* Dallas District Court, 12 Iowa, 139; Mechanics' Savings Bank *v.* Goff, 13 R. I. 516; Urquhart *v.* Brayton, 12 R. I. 169; Lennig's Estate, 52 Penn. St. 135; Thompson *v.* Thompson, 4 Ohio St. 333; Society of Friends *v.* Haines, 47 Ohio St. 423; Daub *v.* Englebach, 109 Ills. 267; Carnahan *v.* Tousey, 93 Ind. 561; Jones *v.* Parks, 78 Ind. 537; Follansbee *v.* Johnson, 28 Minn. 311; Keedle *v.* Flack, 27 Neb. 836; Da Costa *v.* Comfort, 80 Calif. 507; Rickman *v.* Miller, 39 Kans. 362; Schmucker *v.* Seibert, 18 Kans. 104; Willson *v.* Phillips, 27 Tex. 543; Palmeter *v.* Carey, 63 Wisc. 426; Unger *v.* Smith, 44 Mich. 22; Crawford *v.* Edwards, 33 Mich. 354; Carley *v.* Fox, 38 Mich. 387; Miller *v.* Thompson, 34 Mich. 10; Fitzgerald *v.* Barker, 85 Mo. 13 and 70 Mo. 685; Schlatre *v.* Greaud, 19 La. Ann. 125; Tunnard *v.* Hill, 10 La. Ann. 247; Hebert *v.* Doussan, 8 La. Ann. 267.

[2] Conn. Ins. Co. *v.* Tyler, 8 Biss. C. C. 369; Latiolais *v.* Citizens' Bank, 33 La. Ann. 1444.

[3] Keller *v.* Ashford, 133 U. S. 610; Crowell *v.* Currier, 27 N. J. Eq. 152; s. c., on appeal, *nom.* Crowell *v.* St. Barnabas Hospital, 27 N. J. Eq. 650; Klapworth *v.* Dressler, 2 Beasl. (13 N. J. Eq.) 62; Jarmon *v.* Wiswall, 9 C. E. Green (24 N. J. Eq.), 68, 267; Wilson *v.* King, 23 N. J. Eq. 150; Whitcomb *v.* Whitmore, 57 Vt. 437; Garnsey *v.* Rogers, 47 N. Y. 233; Trotter *v.* Hughes, 12 N. Y. 74; King *v.* Whitely, 10 Paige (N. Y.) 465; Halsey *v.* Reed, 9 Paige (N. Y.), 446; Curtis *v.* Tyler, 9 Paige (N. Y.), 432; Blyer *v.* Monholland, 2 Sandf. Ch. (N. Y.) 478; Scott *v.* Featherston, 5 La. Ann. 306.

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[1] Berkshire Ins. Co. *v.* Hutchings, 100 Ind. 496.

[2] As in the case of sureties: *postea*, §§ 154 *et seq.*

[3] Osborne *v* Cabell, 77 Va. 462; Biddel *v.* Brizzolara, 64 Calif. 354; Crowell *v.* Currier, 27 N. J. Eq. 152 and 650.

[4] Laing *v.* Byrne, 34 N. J. Eq. 52; Emley *v.* Mount, 32 N. J. Eq. 470; Dunning *v.* Leavitt, 85 N. Y. 30; Albany Savings Institution *v.* Burdick, 87 N. Y. 40; Talburt *v.* Berkshire Ins. Co., 80 Ind. 434; Gilbert *v.* Sanderson, 56 Iowa, 349.

[5] Klapworth *v.* Dressler, 13 N. J. Eq. 62; Halsey *v.* Reed, 9 Paige (N. Y.), 446.

[6] King *v.* Whitely, 10 Paige (N. Y.), 465; Norwood *v.* De Hart, 30 N. J. Eq. 412; Vreeland *v.* Van Blarcom, 35 N. J. Eq. 530; Nelson *v.* Rogers, 47 Minn. 103; Brown *v.* Stillman, 43 Minn. 126.

[7] *Antea*, § 24. Huyler *v.* Atwood, 26 N. J. Eq. 504.

[8] Trotter *v.* Hughes, 12 N. Y. 74; Curtis *v.* Tyler, 9 Paige (N. Y.), 432; Brown *v.* Winter, 14 Calif. 31; Pruden *v.* Williams, 26 N. J. Eq. 210; William & Mary College *v.* Powell, 12 Gratt. (Va.) 372; Hicks *v.* McGarry, 38 Mich. 667.

[9] Coffin *v.* Adams, 131 Mass. 133; Gable *v.* Scarlett, 56 Md. 169.

be subrogated to any other right against the purchaser.[1] The development of this doctrine, though doubtless an outgrowth of the law of substitution, scarcely comes within the scope of this investigation. It is sufficient to say that it has also been emphatically denied;[2] and the court which laid down this proposition in its broadest terms has refused to apply it to other somewhat similar cases,[3] and has said that the rule is one which ought not to be extended.[4]

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[1] Duncan *v.* Baker, 72 Mo. 469.

[2] Malcolm *v.* Scott, 5 Exch. 601, 610; Meech *v.* Ensign, 49 Conn. 191; Prentice *v.* Brimhall, 123 Mass. 291; *Colt, J.*, in Pettee *v.* Peppard, 120 Mass. 522; Exchange Bank *v.* Rice, 107 Mass. 37; Dow *v.* Clark, 7 Gray (Mass.), 198; Field *v.* Crawford, 6 Id. 116; Millard *v.* Baldwin, 3 Gray (Mass.), 484; Mellen *v.* Whipple, 1 Gray, 317; Mason *v.* Barnard, 36 Mo. 384; Peacock *v.* Williams, 98 Nor. Car. 324; Edwards *v.* Clement, 81 Mich. 513; Booth *v.* Conn. Ins. Co., 43 Mich. 299; Goodenow *v.* Jones, 75 Ills. 48; Gautgert *v.* Hoge, 73 Ills. 30.

[3] Merrill *v.* Green, 55 N. Y. 270; Metropolitan Trust Co. *v.* N. Y. R. R. Co., 45 Hun (N. Y.), 84.

[4] Pardee *v.* Treat, 82 N. Y. 385. And see Garnsey *v.* Rogers, 47 N. Y. 233; Durnherr *v.* Rau, 60 Hun (N. Y.), 358; Beveridge *v.* N. Y. Elevated R. R. Co., 112 N. Y. 1; Biddel *v.* Brizzolara, 64 Calif. 354.

CHAPTER III.

SUBROGATION IN CASES OF SURETYSHIP.

SECTION

Surety's Right of Subrogation . . 86

It is an Equitable Assignment to the Surety 87

Surety subrogated to the Priority of Creditor 88

Sureties of a Trustee subrogated to Rights of the Trustee and of the *Cestuis que Trustent* 89

Sureties of a Sheriff subrogated to Rights which they have satisfied for him 90

Subrogation of a Debtor's Surety against a Sheriff 91

Surety subrogated to Corporation's Lien upon the Stock of its Shareholders 92

Surety entitled to be subrogated, though not in Privity with Principal 93

Surety on a Bond entitled to the Benefit of Prior Bond for the same Debt 94

Surety subrogated to the Benefit of an Agreement made by his Creditor 95

Surety of a Purchaser subrogated to Vendor's Right of Rescission 96

Surety of Purchaser subrogated to Title or Lien retained by Vendor 97

Surety for Vendor subrogated to Equitable Rights of Vendee . 98

Right of Vendor who becomes Surety for Vendee 99

Surety entitled to Funds held for the Debt in the Hands of his Principal . . . . . . , . 100

Surety may avail himself of his Principal's Right of Set-off or Defence 101

Surety is a Creditor of Principal . 102

SECTION

Surety does not lose his Right by agreeing to exonerate his Co-sureties 103

One who has pledged his Property for the Debt of another entitled to Subrogation 104

Extent to which Subrogation will be carried 105

Surety of Surety may be subrogated ; how far 106

How far Creditors of Surety may be subrogated 107

Creditor cannot discharge Security for his own Benefit after Payment by Surety 108

Instances of the Application of the Doctrine of Subrogation for the Protection of Sureties . . . 109

Surety's Right of Subrogation may be lost by his Waiver . . . 110

Surety's Right of Subrogation subject to Creditor's Rights . . 111

Surety indebted to his Principal not entitled to Subrogation against him. 112

Surety's Right confined to the Contract for which he was Surety . 113

Surety's Right to marshal Securities given to the same Creditor for Separate Debts 114

Surety cannot require Creditor to resort first to Security . . . 115

Right of Subrogation destroyed by Application of the Security upon the Debt 116

Creditor's Right to apply Security as needed for his own Protection 117

Surety for Part of a Debt cannot be subrogated while the other Part remains unpaid 118

SECTION

Surety discharged by Creditor's giving up Security to which he would be subrogated 119
Creditor held to Responsibilities of Trustee for Surety 120
Laches of Creditor resulting in loss of Security may discharge Surety 121
Creditor's Discharge of Levy or Attachment on Property of Principal, how far a Discharge of Surety 122
Creditor bound to retain Property of Principal rightfully in his Hands 123
Neglect of Bank to apply Deposits of Principal upon his Note, how far a Discharge of Surety . . 124
Rights of Surety who has paid Debt in Ignorance of Creditor's Discharge of Security . . . 125
Instances where Surety discharged by Creditor's Interference with his Right of Subrogation . . 126
Surety on Bond not to be discharged by Release of Security caused by Act against which Bond taken . . . . . . 126 *a*
Surety not entitled to Subrogation until whole Debt is paid . . 127
Satisfaction is Creditor's Right; it need not come wholly from Surety 128
Creditor's Right to apply Security held for several Debts until all are satisfied 129
Surety may come into Equity to compel Payment of Debt by Principal 130
Equitable Relief given to Surety . 130 *a*
Rights of Successive Sureties to Subrogation against each other 131
Rights of one who becomes Surety for the Payment of a Judgment 132
Where Later Surety is Surety for Original Sureties as well as for Principal 133
Exceptions to Usual Rule of Subrogation between Successive Sureties 134
Whether Original Obligation extinguished by Surety's Payment thereof. Rule in England . . 135
Present English Rule generally adopted in the United States . 136
Right of Surety to be subrogated to the Benefit of the Original Obligation maintained . . . 137
Right of Surety to be subrogated to the Benefit of the Original Obligation denied 138
Indemnity held by a Surety discharged by his release from Liability 139
Subrogation of Co-sureties . . . 140
Co-sureties entitled to the Benefit of Securities held by each other 141
A Surety cannot have Contribution from his Co-sureties without accounting for such Securities 142
A Surety holding Security regarded as Trustee thereof for his Co-sureties 143
His Rights and Liabilities towards his Co-sureties 144
Surety may in Equity prevent Discharge of Security held by his Co-surety 145
Security held by one who is both a Creditor and a Surety . . . 146
Surety must contribute to the Cost of Security of which he seeks the Benefit. Waiver . . . 147
Right of one Surety to stipulate, on becoming such, for Separate Indemnity to himself. . . . 148
Co-surety called upon for Contribution becomes thereby entitled to Subrogation 149
Subsequent Sureties not entitled to Indemnity provided for Prior Sureties 150
Extent of the Right of Subrogation between Co-sureties. Creditor's Interference with the Right . 151
One Surety holding Security from the Principal, holds it for the whole Debt 152
Co-sureties' Right of Subrogation subject to Legal Rights of Third Parties 153

surety is bound in one instrument with the principal or not;[1] and it will be transmitted to the surety's assignees, and to his creditors, when the principal demand has been so used as to destroy their subordinate liens upon his property,[2] and to his heirs when necessary for their protection,[3] and to his grantees, who have lost the property conveyed by him to them in consequence of its being taken upon the principal obligation.[4] And the creditor must do nothing to defeat this right of subrogation on the part of the surety, or to vary the position of the surety;[5] if he takes from the principal debtor a pledge or security for the debt, he must hold the same fairly and impartially, for the benefit of the surety, as well as for his own protection;[6] and if he parts with such property without the knowledge and consent of the surety, he will lose his claim against the latter to the extent of the value of the property so

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Dick v. Moon, 26 Minn. 309; Dozier v. Lewis, 27 Miss. 679; Allison v. Sutherlin, 50 Mo. 274; Arnot v. Woodburn, 35 Mo. 99; Wilson v. Burney, 8 Nebraska, 39; Low v. Blodgett, 21 N. H. 121; Dearborn v. Taylor, 18 N. H. 153; Young v. Vough, 23 N. J. Eq. 325; Irick v. Black, 17 N. J. Eq. 189; Lewis v. Palmer, 28 N. Y. 271; King v. Baldwin, 2 Johns. Ch. (N. Y.) 554; Chatham Bank v. Shipman, 20 Hun (N. Y.), 543; Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431; Towe v. Newbold, 4 Jones Eq. (Nor. Car) 212; Smith v. McLeod, 3 Ired. Eq. (Nor. Car.) 390; Cochran v. Shields, 2 Grant's Cas. (Penn.) 437; Ware, *ex parte*, 5 Rich. Eq. (So. Car.) 473; Bittick v. Wilkins, 7 Heisk. (Tenn.) 307; Wade v. Green, 3 Humph. (Tenn.) 547; Carpenter v. Minter, 72 Tex. 370; Willson v. Phillips, 27 Tex. 543; James v. Jacques, 26 Tex. 320; Leake v. Ferguson, 2 Gratt. (Va.) 419; Miller v. Pendleton, 4 Hen. & Munf. (Va.) 436; Highland v. Highland, 5 W. Va. 63.

[1] Enders v. Brune, 4 Randolph (Va.), 438; Havens v. Willis, 100 N. Y. 482.

[2] Moore v. Bray, 10 Penn. St. 519; Holt v. Bodey, 18 Penn. St. 207; Neff v. Miller, 8 Penn. St. 347; Neff's Appeal, 9 Watts & Serg. (Penn.) 36; Ebenhardt's Appeal, 8 Watts & Serg. (Penn.) 327; Huston's Appeal, 69 Penn. St. 485 (overruling Harrisburg Bank v. German, 3 Penn. St. 300); Skinner v. Terhune, 45 N. J. Eq. 565; Davenport v. Hardeman, 5 Ga. 580; Morris v. Evans, 2 B. Mon. (Ky). 84; Neimcewicz v. Gahn, 3 Paige (N. Y.), 614; York v. Landis, 65 Nor. Car. 535; Watts v. Kinney, 3 Leigh (Va.), 272; McDaniels v. Flower Brook Manufg. Co., 22 Vt. 274.

[3] Meador v. Meador, 88 Ky. 217.

[4] Beaver v. Slanker, 94 Ills. 175; Wilson v. Murray, 90 Ind. 477; State Bank v. Davis, 4 Ind. 653.

[5] Pearl v. Deacon, 24 Beav. 186.

[6] Forbes v. Jackson, 19 Ch. D. 615.

surrendered.[1] The surety is discharged, at least *pro tanto*, whenever by reason of the affirmative act of the creditor, the surety can no longer be substituted to the rights and securities of the creditor.[2] "The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; ,and the right results more from equity than from contract or *quasi* contract, unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication. A surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor."[3] But the surety cannot acquire by subrogation any greater rights than the creditor himself enjoyed.[1]

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[1] Guild *v.* Butler, 127 Mass. 386; Baker *v.* Briggs, 8 Pick. (Mass.) 122; Cummings *v.* Little, 45 Maine, 183; New Hampshire Savings Bank *v.* Colcord, 15 N. H. 119; Everly *v.* Rice, 20 Penn. St. 297; Ashby *v.* Smith, 9 Leigh (Va.), 164; Stallings *v.* Americus Bank, 59 Ga. 701; Perrine *v.* Mobile Ins. Co., 22 Ala. 575; McMullen *v.* Hinkle, 39 Miss. 142; Pratt's Succession, 16 La. Ann. 357; Philbrooks *v.* McEwen, 29 Ind. 347; Stewart *v.* Davis, 18 Ind. 74; Kirkpatrick *v.* Howk, 80 Ills. 122; Morley *v.* Dickinson, 12 Calif. 561.

[2] Kinnaird *v.* Webster, 10 Ch. Div. 139; American Bank *v.* Baker, 4 Met. (Mass.) 164; City Bank *v.* Young, 43 N. H. 457; Hurd *v.* Spencer, 40 Vt. 581; Black River Bank *v.* Page, 44 N. Y. 453; Commonwealth *v.* Miller, 8 Serg. & R. (Penn.) 452; Kennedy *v.* Brossiere, 16 La. Ann. 445; Jenkins *v.* McNeese, 34 Tex. 189; Cooper *v.* Wilcox, 2 Dev. & Bat. Eq. (No. Car.) 90; Turner *v.* McCarter, 42 Ga. 491; Winston *v.* Yeargin, 50 Ala. 340; Hall *v.* Hoxsey, 84 Ills. 616; Rogers *v.* School Trustees, 46 Ills. 428; Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24; Middleton *v.* Marshalltown Bank, 40 Iowa, 29; Saline County *v.* Buie, 65 Mo. 63.

[3] Lord Brougham, in Hodgson *v.* Shaw, 3 Myl. & K. 183; Hill *v.* Voorhies, 22 Penn. St. 68.

§ 87. **It is an Equitable Assignment to the Surety.** — Although the surety's right of subrogation has been sometimes limited to securities in the hands of the creditor at the inception of the suretyship,[2] yet it is now settled that no such limitation exists.[3] So soon as the surety pays the debt of his principal, there arises in his favor an equity to have all the securities held by the creditor for the demand turned over to him, and to avail himself of them as fully as the creditor could have done.[4] For the purposes of his indemnification he is entitled to be subrogated to all the rights, remedies, and securities of the creditor, and is allowed to enforce all the creditor's rights and remedies and means of payment against the principal.[5] Although the surety's payment discharges the debt and extinguishes all the securities, so far as it concerns the creditor, it does not have that effect as between the principal and the

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[1] Schur *v.* Schwartz, 140 Penn. St. 53; Miller *v.* Stout, 5 Del. Ch. 259; Walsh *v.* M'Bride, 72 Md. 45; Morsell *v.* Caroline, 22 Md. 391; Barton *v.* Brent, 87 Va. 385; Perkins *v.* Nolan, 79 Ga. 295, 300; Benneson *v.* Savage, 130 Ills. 352; Wynne *v.* Willis, 76 Tex. 589; Kilpatrick *v.* Dean, 15 Daly (N. Y.), 182.

[2] Wade *v.* Coope, 2 Sim. 155; Newton *v.* Chorlton, 10 Hare, 646; Lake *v.* Brutton, 8 De G., M. & G. 440

[3] Alexander *v.* Ellison, 79 Ky. 148; Ruble *v.* Norman, 7 Bush (Ky.), 582; Lochenmeyer *v.* Fogarty, 112 Ills. 572; Fegley *v.* McDonald, 89 Penn. St. 128; Commonwealth *v.* Miller, 8 Serg. & R. (Penn) 452; Hubbell *v.* Carpenter, 5 Barb. (N. Y.) 520; Springer *v.* Toothaker, 43 Maine, 381; Pearl St. Society *v.* Imlay, 23 Conn. 10; Pierce *v.* Holzer, 65 Mich. 263; Nelson *v.* Williams, 2 Dev. & Bat. Eq. (No. Car.) 118; Shattuck *v.* Cox, 128 Ind. 293; Monroe Bank *v.* Gifford, 79 Iowa, 300; May *v.* White, 40 Iowa, 246.

[4] Barger *v.* Buckland, 28 Gratt. (Va.) 850; Sasscer *v.* Young, 6 Gill & J. (Md.) 243; Lowndes *v.* Chisolm, 2 McCord Eq. (So. Car.) 455; Klopp *v.* Lebanon Bank, 46 Penn. St. 88; Murray *v.* Catlett, 4 Green (Iowa), 108; Jacques *v.* Fackney, 64 Ills. 87; Holliday *v.* Brown, 50 N. W. Rep. 1042; Smith *v.* Schneider, 23 Mo. 447; Loughridge *v.* Bowland, 52 Miss. 546.

[5] Ward's Appeal, 100 Penn. St. 289; May *v.* Burke, 80 Mo. 675; Darst *v.* Bates, 95 Ills. 493; Conway *v.* Strong, 24 Miss. 665; Chrisman *v.* Harman, 29 Gratt. (Va.) 494; Cullum *v.* Emanuel, 1 Ala. 23; Storms *v.* Storms, 3 Bush (Ky.), 77; Ghiselin *v.* Fergusson, 4 Harr. & Johns. (Md.) 522; Cottrell's Appeal, 23 Penn. St. 294.

Any collateral security received by the creditor from the principal debtor will inure to the benefit of the surety.[1]

§ 88. **Surety subrogated to Priority of Creditor.** — Accordingly, where the government is entitled to priority in the payment of a debt, a surety for the debtor will, upon paying the debt to the government, be subrogated to its priority;[2] and he can enforce this right in a court of equity.[3] This doctrine has been applied to the case of a surety upon a custom-house bond for the payment of duties to the United States,[4] even in cases in which there was no statutory provision for such substitution, the owner of the goods not having been a party to the bond;[5] and also in favor of some of the sureties of a United States collector who had made default and died insolvent, after their payment of his indebtedness to the United States, as against their co-sureties,[6] and also to protect such sureties against the principal debtor.[7] But where the principal debtor is still further indebted to the government, the surety, although he has paid all for which he was bound, cannot be subrogated to this right of priority in competition with the government,[8] nor will the surety necessarily be subrogated to all the prerogative rights of the government.[9] And the claim of sureties upon bonds given to the United States for the payment of duties upon imported goods, which they have since paid, is superior to the claim of a purchaser of these goods from the importer, although such purchaser has lost the goods by reason of an unlawful sale of them for the same duties by the collector.[1]

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[1] Kirkman *v.* Bank of America, 2 Coldw. (Tenn.) 397; Newton *v.* Chorlton, 10 Hare, 646.

[2] United States *v.* Herron, 20 Wallace, 251; Hunter *v.* United States, 5 Peters, 173, 182, 183; Richeson *v.* Crawford, 94 Ill. 165; Jackson *v.* Davis, 4 Mackey (D. C.), 194; Regina *v.* Salter, 1 Hurlstone & Norman, 274.

[3] Churchill, *in re*, 39 Ch. D. 174; Boltz's Estate, 133 Penn. St. 77; Orem *v.* Wrightson, 51 Md. 34; Miller *v.* Woodward, 8 Mo. 169.

[4] United States *v.* Preston, 4 Wash. C. C. 446; Dias *v.* Bouchaud, 10 Paige (N. Y.), 445; West *v.* Creditors, 3 La. Ann. 529.

[5] Enders *v.* Brune, 4 Rand. (Va.) 438. And see Prather *v.* Johnson, 3 Harr. & Johns. (Md.) 487.

[6] Robertson *v.* Triggs, 32 Gratt. (Va.) 76.

[7] Livingston *v.* Anderson, 80 Ga. 175; Irby *v.* Livingston, 81 Ga. 281.

[8] Queen *v.* O'Callaghan, 1 Irish Eq. 439; Heth *v.* Lewis, 114 Ind. 508.

[9] Kerr *v.* Hamilton, 1 Cranch, C. C. 546; Jones *v.* Gibson, 82 Ky. 561.

§ 89. **Sureties of a Trustee subrogated to the Rights of the Trustee and of the Cestuis que Trustent.** — Where the sureties of a trustee have been compelled to answer for his breach of trust, they are subrogated to the remedies of the trustee[2] and to the rights of both the trustee and the *cestui que trust* against those who have participated in his wrongful acts.[3] The guardian of an infant having wrongfully assigned a bond payable to him in his official capacity, and the sureties upon his official bond having made up the loss, they were allowed to recover from the assignee of the bond, just as the ward could have done.[4] The sureties of a deceased guardian who have satisfied the ward for his default will be subrogated to the rights and remedies of the ward against the guardian's estate,[5] and against all parties whose liability was primary to that of the sureties.[6] The sureties upon the official bond of an insolvent clerk of court will in equity be entitled, upon a breach of trust by their principal, to all the remedies and securities that were in the power of the *cestuis que trustent* or the creditors against one who participated in the breach of trust.[7] If an administrator, being about to leave the State, deposits the assets of the estate with a stranger, in trust for the next of kin of the intestate, the sureties of the administrator, against whom recoveries have been had by any of the next of kin, have a right to call upon this stranger for an account of the assets so received by him, and to be subrogated against him to the rights of such of the next of kin as have held the sureties to responsibility.[1] And although it has been decided in Massachusetts that a surety upon an administrator's probate bond, who has been obliged to pay a judgment recovered by the heirs-at-law upon the bond, and has taken an assignment of all their rights in the estate and all claims of theirs therefor, cannot maintain a suit against an agent of the administrator having in his hands moneys belonging to the estate, yet this decision was put upon the ground that the heirs could not themselves have maintained such an action, but were restricted to their remedy upon the administrator's bond.[2] A surety upon an administrator's bond who has paid one-half of a judgment recovered by a creditor of the intestate against the administrator will not be subrogated to the rights of the creditor whom he has partly paid, but to those of the administrator for whom he has made the payment;[3] for a surety's subrogation to the remedies of the creditor is allowed only when the creditor has been fully satisfied.[4]

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[1] Dias *v.* Bouchaud, 10 Paige (N. Y.), 445.

[2] Boyd *v.* Myers, 12 Lea (Tenn.), 175; Bushong *v.* Taylor, 82 Mo. 660; Wheeler *v.* Hawkins, 116 Ind. 515; Schoonover *v.* Allen, 40 Ark. 132.

[3] Blake *v.* Traders' Bank, 145 Mass. 13; Edmunds *v.* Venable, 1 Patton & H. (Va.) 121; Adams *v.* Gleaves, 10 Lea (Tenn.), 367; Wilson *v.* Doster, 7 Ired. Eq. (Nor. Car.) 231; Rhame *v.* Lewis, 13 Rich. Eq. (So. Car.) 270; McNeil *v.* Morrow, Rich. Eq. Cas. (So. Car.) 172.

[4] Powell *v.* Jones, 1 Ired. Eq. (No. Car.) 337; Fox *v.* Alexander, 1 Ired. Eq. (Nor. Car.) 340; Cowgill *v.* Linville, 20 Mo. Ap. 138.

[5] McClelland *v.* Davis, 4 Lea (Tenn.), 97; Walker *v.* Crowder, 2 Ired. Eq. (Nor. Car.) 478; State *v.* Atkins, 53 Ark. 303; Gilbert *v.* Neely, 35 Ark. 24.

[6] Blake *v.* Traders' Bank, 145 Mass. 13; Thompson *v.* Humphrey, 83 Nor. Car. 416; Shields *v.* Whittaker, 82 Nor. Car. 516; Harris *v.* Harrison, 78 Nor. Car. 202; Morley *v.* Metamora, 78 Ills. 394; Muldoon *v.* Crawford, 14 Bush (Ky.), 125.

[7] Bunting *v.* Ricks, 2 Dev. & Bat. Eq. (Nor. Car.) 130.

§ 90. **Sureties of a Sheriff subrogated to Rights which they have satisfied for him.** — The sureties of a sheriff, who have been compelled to pay a judgment recovered against him by the owner of property which he had taken on an execution against a third party, and had turned over to the judgment-creditor, have been allowed to recover the value of such property against that plaintiff; the sureties who had satisfied the owner were substituted to his cause of action against the

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[1] Kennedy *v.* Pickens, 3 Ired. Eq. (Nor. Car.) 147.

[2] Winslow *v.* Otis, 5 Gray (Mass.), 360, as in Adams *v.* Gleaves, 10 Lea (Tenn.), 367. And see Stetson *v.* Moulton, 140 Mass. 597.

[3] Clark *v.* Williams, 70 Nor. Car. 679.

[4] *Antea*, § 88; *postea*, § 127.

sheriff for such funds.[1] A surety who has been obliged to satisfy an execution against his principal in consequence of the sheriff's having wrongfully applied the proceeds of the principal's property to the payment of a junior execution for which the surety was not liable, will be subrogated to the prior creditor's remedy against the sheriff,[2] as he will be if the opportunity of obtaining satisfaction from the principal has been lost by the fault of the sheriff.[3] But if the liability of the sheriff had been for mere negligence, in not collecting and returning the execution, under such circumstances that the sheriff himself, upon making compensation for his default, would have been entitled to be subrogated to the rights of the creditor against all the defendants in the execution,[4] then a payment by the surety would not have entitled him to any redress against the sheriff,[5] unless the sheriff's neglect had resulted in a loss to the surety for which he could not obtain satisfaction from his principal.[6] And the surety cannot be subrogated to the principal debtor's remedies against the sheriff, until the surety shall have satisfied the judgment.[7] In a suit at law on a constable's bond for an escape, if, since the bringing of the action, the original judgment has been satisfied by a surety for the debtor, no more than nominal damages will be allowed, even though the suit, after this satisfaction, was prosecuted for the benefit of the surety.[8]

§ 92. **Surety subrogated to Corporation's Lien upon the Stock of its Shareholders.** — When corporations have a lien upon the stock of their shareholders for the payment of debts due from the latter to the corporations, a surety paying such indebtedness will be subrogated to this lien,[1] and if the corporation abandons this lien, it puts itself in the place of the debtor.[2] The surety's equitable right attaches the instant the lien of the corporation commences, and is consummated by his payment of the indebtedness for which he is bound as surety.[3] If, however, the corporation, though having the power to create such a lien, has never exercised its option to do so, then no lien exists, and there is nothing to which the surety can be subrogated.[4]

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[1] Merryman *v.* State, 5 Harr. & Johns. (Md.) 423; Bellows *v.* Allen, 23 Vt. 169.

[2] Commonwealth *v.* Straton, 7 J. J. Marsh. (Ky.) 90. See Straton *v.* Commonwealth, 2 Dana (Ky.), 397.

[3] Rowe *v.* Williams, 7 B. Mon. (Ky.) 202; Miller *v.* Dyer, 1 Duv. (Ky.) 263. *Contra*, in Massachusetts, at law, in Harrington *v.* Ward, 9 Mass. 251.

[4] *Antea*, § 7.

[5] Bellows *v.* Allen, 23 Vt. 169; O'Hara *v.* Schwab, 26 La. Ann. 78.

[6] Pennsylvania Bank *v.* Potius, 10 Watts (Penn.), 148, 152. See Boughton *v.* Orleans Bank, 2 Barb. Ch. (N. Y.) 458; Gary *v.* Bank of the State, 11 Ala. 771; Hill *v.* Sewell, 27 Ark. 15.

[7] Griff *v.* Steamboat Stacy, 12 La. Ann. 8.

[8] State *v.* Miller, 5 Blackf. (Ind.) 381.

§ 93. **Surety entitled to be subrogated though not in Privity with his Principal.** — The surety will be subrogated to the rights of the creditor against the principal, though there is no privity of contract between the principal and the surety.[5] A. owed a debt to B., who was indebted to C. At the request of B., and in pursuance of an arrangement between B. and C., A. gave a bond and mortgage for his debt directly to C. A third party then, at the solicitation of B., but without any request from the mortgagor, guaranteed the payment of the bond, and was compelled to pay it upon his guaranty: and he was subrogated to the benefit of the mortgage for his reimbursement, although he had no remedy at law against the principal debtor;[6] for the surety's right of subrogation does not rest upon contract or privity, but upon principles of natural justice and equity;[7] and it would have been no defence to the surety, in an action against him by the creditor, that he became surety without the privity of the principal,[8] though he might not have been able to obtain indemnity from his principal by an action at law.[1] So a surety for a part of the debt, as he cannot be subrogated to the creditor's securities until the whole debt is paid,[2] may pay the whole debt, including the part for which he is not liable, and enforce the creditor's securities to reimburse him for his full payment.[3]

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[1] Klopp *v.* Lebanon Bank, 46 Penn. St. 88; Young *v.* Vough, 23 N. J. Eq. 325.

[2] Houston & Texas Ry. Co. *v.* Bremond, 66 Tex. 159.

[3] Klopp *v.* Lebanon Bank, 46 Penn. St. 88; Petersburg Savings Co. *v.* Lumsden, 75 Va. 327.

[4] Perrine *v.* Mobile Ins. Co., 22 Ala. 575; Dunlop, *in re*, 21 Ch. D. 583.

[5] Burns *v.* Huntington Bank, 1 Pen. & W. (Penn.) 395; Matthews *v.* Aikin, 1 N. Y. 595.

[6] Matthews *v.* Aikin, 1 N. Y. 595.

[7] Miller *v.* Stout, 5 Del. Ch. 259.

[8] Hughes *v.* Littlefield, 18 Maine, 400. And see Wright *v.* Garlinghouse, 27 Barb. (N. Y.) 474.

§ 94. **Surety upon a Bond entitled to the Benefit of a Prior Bond for the same Debt.** — Where a bond has been given by two debtors for the payment of a debt, and after the death of one of them the other gives a new bond with a surety for a part of the demand due upon the first bond, such surety, after paying the amount of the second bond, and taking an assignment of the first bond, may enforce it against the estate of the deceased debtor.[4] The surety will be subrogated under any other bonds held for the same debt.[5]

§ 95. **Surety subrogated to the Benefit of an Agreement made by his Creditor.** — A surety has an equity to be substituted to the benefits obtained by the creditor under an agreement made with other creditors of the same debtor, allowing him to share in the proceeds of property of the debtor upon which he would otherwise have had no claim.[6] If a vendor of land has authorized his vendee to bring suit against an adverse occupant of the premises, agreeing to allow as a part payment of the purchase-money the vendee's expenses in prosecuting the suit, sureties on a bond given by the vendee for the prosecution of the suit will, upon being held on their bond, be subrogated to the rights of their principal, the vendee, against the vendor under this agreement.[7]

§ 96. **Surety of a Purchaser subrogated to Vendor's Right of Rescission.** — Where the seller of property has the right to

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[1] McPherson *v.* Meek, 30 Mo. 345; Carter *v.* Black, 4 Dev. & Bat. Law (Nor. Car.) 425.

[2] *Postea*, § 118.

[3] Gerber *v.* Sharp, 72 Ind. 553.

[4] Hodgson *v.* Shaw, 3 Mylne & K. 183.

[5] Dodd *v.* Wilson, 4 Del. Ch. 108, 399.

[6] Person *v.* Perry, 70 Nor. Car. 697.

[7] American Land Co. *v.* Grady, 33 Ark. 550.

stroyed by the purchaser's sale and conveyance of his interest in the property.[1] Whenever the vendor of property, real or personal, retains a lien thereon for the payment of the purchase-money, a surety for the purchaser, who is held liable for the purchase-money, is entitled to be subrogated to this lien,[2] except such a lien as is merely personal and unassignable.[3] So, if property is sold under a decree of court, the title being retained or a lien reserved upon the property for the purchase-money, the purchaser's surety for the price may be substituted to this lien upon the default of the purchaser, and may have the property sold for his relief, even before he has himself paid the price,[4] and although the principal debtor has himself transferred his interest in the property to other persons.[5] Though the surety cannot ordinarily be subrogated to the rights of the creditor against the principal debtor until he has actually paid the debt,[6] yet, under such circumstances, the surety has been allowed to have the property resold for his own protection,[7] because the surety's right to hold for his indemnity the property thus purchased is superior to that of the purchaser, the principal debtor.[8]

§ 98. **Surety for Vendor subrogated to Equitable Rights of Vendee.** — A surety for the vendor to the vendee of property will, upon answering for the default of his principal, be subrogated in like manner to the equitable rights of the vendee against the vendor. Thus, where the vendor of land gave a bond with surety to the vendee, conditioned to make a title to the land upon payment of the purchase-money, and before the money was all paid the land was sold on an execution against the vendor, who became insolvent, and thereupon the vendee sued the surety upon the bond, and recovered judgment against him for the money that had been paid, it was held that the surety could follow the land, and have remuneration out of it in the hands of the purchasers at the sheriff's sale for the amount that he had thus been compelled to pay,[1] being subrogated to the purchaser's equitable lien[2] upon the land for the reimbursement of partial payments of the price.

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[1] Fulkerson *v.* Brownlee, 69 Mo. 371; Myres *v.* Yaple, 60 Mich. 339; Kleiser *v.* Scott, 6 Dana (Ky.), 137; Smith *v.* Schneider, 23 Mo. 447; Ghiselin *v.* Fergusson, 4 Harr. & J. (Md.) 522; Egerton *v.* Alley, 6 Ired. Eq. (Nor. Car.) 188; Shoffner *v.* Fogleman, Winston Eq. (Nor. Car.) 12.

[2] Ballew *v.* Roler, 124 Ind. 557; Wernecke *v.* Kenyon, 66 Mo. 275; Ellis *v.* Roscoe, 4 Baxter (Tenn.), 418; Riddle *v.* Coburn, 8 Gray (Mass), 241; Carter *v.* Sims, 2 Heisk. (Tenn.) 166; Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50.

[3] McNeill *v.* McNeill, 36 Ala. 109. *Postea*, § 185.

[4] Henry *v.* Compton, 2 Head (Tenn.), 549.

[5] Green *v.* Crockett, 2 Dev. & Bat. Eq. (Nor. Car.) 390; Polk *v.* Gallant, 2 Dev. & Bat. Eq. (Nor. Car.) 395.

[6] *Postea*, §§ 118, 127.

[7] Bradford *v.* Marvin, 2 Fla. 463; Pettillo, *in re*, 80 Nor. Car. 50; Stenhouse *v.* Davis, 82 Nor. Car. 432; Ferrer *v.* Barrett, 4 Jones Eq. (Nor. Car.) 455.

[8] Spring *v.* Chipman, 6 Vermont, 662; Keith *v.* Hudson, 74 Ind. 333.

§ 99. **Right of Vendor who becomes Surety for Vendee.** — A vendor of land took the purchaser's note for the price thereof, and gave a bond for title when the purchase-money should be paid. When half the purchase-money had been paid the vendee sold the land, giving a warranty deed thereof to a *bona fide* purchaser for value, who had no knowledge that the title was still in the original vendor. Afterwards, the vendor knowing of this conveyance, the original vendor and vendee made a verbal agreement that the vendee should pay the balance of his purchase-money by paying a debt of the vendor, giving his own note therefor with the vendor as a surety, and that, if the vendor as such surety should be compelled to pay this note, the purchase-money should again become due from the vendee to the vendor, and the vendor should still hold the legal title to the land as security therefor. The vendor was compelled to pay this note, and then evicted the new purchaser from the land, and held it himself under his legal title. The vendor then claimed the balance of the purchase-money from the vendee; and the vendee's purchaser claimed damages for the breach of the vendee's warranty. It was held that the original price was paid by the making of the verbal agreement between the vendor and the vendee, and that the indebtedness for this price was not revived by reason of the contract of suretyship; but that the original vendor having elected to rescind his contract of sale by resorting to his legal title and evicting his vendee's purchaser, and having thus made his vendee liable in damages to such purchaser, he must refund to his vendee the half of the purchase-money which he had received.[1]

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[1] Freeman *v.* Mebane, 2 Jones Eq. (Nor. Car.) 44.

[2] Clark *v.* Jacobs, 56 How. Pr. (N. Y.) 519; Payne *v.* Atterbury, Harr. (Mich.) 414; Shirley *v.* Shirley, 7 Blackf. (Ind.) 452; Wickerman *v.* Robinson, 14 Wisc. 493; Brown *v.* East, 5 T. B. Mon. (Ky.) 405; Griffith *v.* Depew, 3 A. K. Marsh. (Ky.) 177.

§ 100. **Surety entitled to Funds held for the Debt in the Hands of his Principal.** — Where sureties are held to pay the debt of their principal, they are entitled in equity to the benefit of all funds and assets, so far as these can be specifically reached, which their principal held as specifically applicable to the debt which they have paid, and to have these funds and assets made available for their protection.[2] A person taking any of such securities from the principal debtor, with notice of his responsibilities, is bound in equity to hold them for the indemnification of the sureties.[3] So the surety may enforce the principal's right to indemnity or repayment from others.[4] Where one who held a mortgage as administrator took a deed of the equity of redemption from the mortgagor to himself individually, it was held, since this deed only made absolute the defeasible estate already vested in him as administrator, that an agreement by the legatees of the estate that he should hold the land in his own right, leaving his sureties liable for the balance due upon his account, could not be supported against the sureties, but that the latter could resort for their indemnity to the land, both in the

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[1] Davis *v.* Smith, 5 Ga. 274.

[2] Hobson *v.* Bass, L. R. 6 Ch. 792; Gee *v.* Pack, 33 L. J. Q. B. 49; *Shaw, C. J.*, in Johnson *v.* Bartlett, 17 Pick. (Mass.) 477, 488; Lingle *v.* Cook, 32 Gratt. (Va.) 262.

[3] Atwood *v.* Vincent, 17 Conn. 575.

[4] Rodenbarger *v.* Bramblett, 78 Ind. 213; Josselyn *v.* Edwards, 57 Ind. 212.

Set-off or Defence. — A surety, when sued upon his contract, may avail himself of his principal's right of set-off growing out of the same transaction.[1] Thus, it is a good equitable defence to the surety, as to part of the amount claimed of him, that a dispute as to the consideration of the contract having arisen between the plaintiff and the defendant's principal, and the dispute having been referred to arbitration in accordance with the original agreement, this amount had been awarded to the defendant's principal, which the principal had offered before suit brought to set off against the present claim.[2] So, when the payee of a note sued a surety thereon, and it appeared that the note was given for a tract of land sold by the payee of the note to the principal maker, and that at the time of the sale there was an incumbrance upon the land, which the principal had since discharged with the consent of the plaintiff, and upon the latter's promise to allow it as a credit upon the note, it was held that this promise to the principal inured also to the benefit of the surety, and operated a satisfaction of the note *pro tanto.*[3] The surety may in general set up against the claim of the creditor any legal or equitable defence which would have been open to the principal,[4] such as the estoppel of a previous judgment between the creditor and the principal.[5] But the surety's equity to avail himself of his principal's right of set-off against the creditor does not extend to distinct demands of the principal, not in themselves available by way of set-off,[6] and not growing out of the same transaction,[1] unless the principal is insolvent,[2] or the principal has taken advantage of the set-off in a joint action against principal and surety.[3] And this right of set-off is reciprocal to the creditor and the sureties as against the principal.[4] But the surety cannot without the authority of the principal set up against the creditor the failure of the title to the property for the price of which he became surety; the principal may bind his surety as well as himself by waiving the defence of a defective title or a breach of warranty in the conveyance by which the debt was created.[5] The surety is bound in the same manner and to the same extent as his principal;[6] and if the latter is satisfied with his purchase, it cannot be rescinded by the surety for a defect in the title which is given.[7] And the surety may prosecute an appeal or a writ of error to reverse a judg-

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[1] Bechervaise *v.* Lewis, L. R. 7 C. P. 372; Hauser *v.* King, 76 Va. 731; McDonald Manufacturing Co. *v.* Moran, 52 Wisc. 203; Hiner *v.* Newton, 30 Wisc. 640; Myers *v.* State, 45 Ind. 160; Waterman *v.* Clark, 76 Ills. 428; Ellis *v.* Fisher, 10 La. Ann. 479.

[2] Murphy *v.* Glass, L. R. 2 P. C. 408.

[3] Cole *v.* Justice, 8 Ala. 793.

[4] Baines *v.* Barnes, 64 Ala. 375; Smokey *v.* Peters-Calhoun Co., 66 Miss. 471; State *v.* Cordon, 8 Ired. Law (Nor. Car.) 179; Jarratt *v.* Martin, 70 Nor. Car. 459; Huntress *v.* Patten, 20 Maine, 28; Ames *v.* Maclay, 14 Iowa, 281; First National Bank *v.* Rogers, 13 Minn. 407; Adams *v.* Cuny, 15 La. Ann. 485.

[5] Gill *v.* Morris, 11 Heisk. (Tenn.) 614; Bank of Commerce *v.* Porter, 1 Baxter (Tenn.), 447.

[6] People *v.* Brandreth, 3 Abbott,

Pr. N. S., (N. Y.) 224; La Farge *v.* Halsey, 1 Bosw. (N. Y.) 171; Thalheimer *v.* Crow, 13 Color. 397.

[1] Morgan *v.* Smith, 70 N. Y. 537; s. c. 7 Hun (N. Y.), 244; Lasher *v.* Williamson, 55 N. Y. 619; Springer *v.* Dwyer, 50 N. Y. 19; Lewis *v.* McMillen, 41 Barb. (N. Y.) 420; Emory *v.* Baltz, 22 Hun (N. Y.), 434; Henry *v.* Daley, 17 Hun (N. Y.), 210; Putnam *v.* Schuyler, 4 Hun (N. Y.), 166; East River Bank *v.* Rogers, 7 Bosw. (N. Y.) 493; Baltimore & Ohio R. R. Co. *v.* Bitner, 15 W. Va. 455; Dart *v.* Sherwood, 7 Wisc. 523; Woodruff *v.* State, 7 Ark. 333; Stewart *v.* Levis, 42 La. Ann. 37; Vastine *v.* Dinan, 42 Mo. 269.

[2] Coffin *v.* McLean, 80 N. Y. 560; Morgan *v.* Smith, *supra;* Gillespie *v.* Torrance, 25 N. Y. 306; Hazard *v.* Irwin, 18 Pick. (Mass.) 95; Edmunds *v.* Harper, 31 Gratt. (Va.) 637; Patterson *v.* Gibson, 81 Ga. 802; Marchman *v.* Robertson, 77 Ga. 40; Sharon *v.* Sharon, 84 Calif. 433; Becker *v.* Northway, 44 Minn. 61.

[3] Himrod *v.* Baugh, 85 Ills. 435; Springer *v.* Dwyer, 50 N. Y. 19; Bathgate *v.* Haskin, 59 N. Y. 533; O'Blenis *v.* Karing, 57 N. Y. 649; Concord *v.* Pillsbury, 33 N. H. 310; Harris *v* Rivers, 53 Ind. 216; Wartman *v.* Yost, 22 Gratt. (Va.) 595; Mahurin *v.* Pearson, 8 N. H. 539; Crist *v.* Brindle, 2 Rawle (Penn.), 121; Guggenheim *v.* Rosenfeld, 9 Baxter (Tenn.), 533; Lynch *v.* Bragg, 13 Ala. 773; Harrison *v.* Henderson, 4 Ga. 198; Bourne *v.* Bennett, 4 Bing. 423.

[4] Andrews *v.* Varrell, 46 N. H 17.

[5] Ross *v.* Woodville, 4 Munf. (Va.) 324; Henry *v.* Daley, 17 Hun (N. Y), 210.

[6] Chilson *v.* Adams, 6 Gray (Mass.), 364; Evans *v.* Kneeland, 9 Ala. 42; Moulton *v.* Beauchamp, 10 La. Ann. 666.

[7] Osborn *v.* Bryce, 23 Fed. Rep. 171; Lyon *v.* Leavitt, 3 Ala. 430; Lillard *v.* Puckett, 9 Baxter (Tenn.), 568; Walker *v.* Gilbert, 7 Sm. & M. (Miss.) 456.

ment recovered against the principal which would have been conclusive upon the surety.[1]

§ 102. **The Surety is a Creditor of the Principal.** — When the principal debtor is bankrupt, the sureties, in respect of their liability, are regarded in equity as his creditors,[2] and may retain any funds of the principal in their hands,[3] even against a *bona fide* purchaser thereof for value without notice of their rights.[4] The surety is regarded in equity as a creditor of his principal and has all the privileges of a creditor,[5] from the time of his signing the obligation by which he is bound,[6] just as he is liable to the creditor from that time;[7] though his right of action against his principal[8] and his equity to be subrogated to the securities held by the creditor do not become complete until his payment of the debt.[9] Though the principal's liability to indemnify his surety is, previous to payment by the latter, merely contingent, it is nevertheless a debt, and will be embraced within the terms of a will made by the principal charging his real estate with the payment of his debts.[10] But when a surety is liable as such for several different debts of the same principal, the

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[1] Farrar *v.* Parker, 3 Allen (Mass.), 556; Lyon *v.* Tallmadge, 14 Johns. (N. Y.) 501.

[2] Mace *v.* Wells, 7 How. 272, reversing Wells *v.* Mace, 17 Vt. 503; Crafts *v.* Mott, 5 Barb. (N. Y.) 305; Moorhead's Appeal, 32 Penn. St. 297; Walker *v.* Dicks, 80 Nor. Car. 263; Reitz *v.* People, 72 Ills. 435; Davis *v.* McCurdy, 50 Wisc. 569.

[3] Beaver *v.* Beaver, 23 Penn. St. 167; Mattingly *v.* Sutton, 19 W. Va. 19; McKnight *v.* Bradley, 10 Rich. Eq. (So. Car.) 551.

[4] Reynolds, *in re*, 16 N. B. R. 158; McKnight *v* Bradley, 10 Rich. Eq. (So. Car.) 557; Abbey *v.* Van Campen, 1 Freem. Ch. (Miss.) 273; Battle *v.* Hart, 2 Dev. Eq. (Nor. Car.) 31.

[5] McKee *v.* Scobee, 80 Ky. 124; Bragg *v.* Patterson, 85 Ala. 233; Lane *v.* Spiller, 18 N. H. 209; Williams *v.* Washington, 1 Dev. Eq. (Nor. Car.) 137.

[6] Scott *v.* Timberlake, 83 Nor. Car. 382; Keel *v.* Larkin, 72 Ala. 493; Sargent *v.* Salmon, 27 Maine, 539; Watson *v.* Dickens, 12 Sm. & M. (Miss.) 608; State *v.* Hemingway, 10 So. Rep. 575.

[7] McMillan *v.* Bull's Head Bank, 32 Ind. 11; Danforth *v.* Robinson, 80 Maine, 466; Pulsifer *v.* Waterman, 73 Me. 233, 238.

[8] Adams *v.* Tator, 57 Hun (N. Y.), 302; Huse *v.* Ames, 104 Mo. 91.

[9] Loughridge *v.* Bowland, 52 Miss. 546; Choteau *v.* Jones, 11 Ills. 300.

[10] Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398.

debtor;[1] nor will this right be affected by the fact that the charge upon the property of the surety was created by the same instrument by which the property of the principal was mortgaged to the creditor, and that this instrument provided that, upon payment by either principal or surety, the creditor should reconvey both the charge of the surety and the mortgaged lands of the principal, to be held upon the same uses as before the execution of the instrument.[2] If a wife becomes a surety for her husband by the creation of a valid lien upon her own estate for the payment of his debt, she will be entitled to the same equitable rights as would be enjoyed by any other surety,[3] and will be subrogated to the rights of the creditor against her husband's property, even against her husband's assignee in insolvency,[4] and even though the property has come to the hands of a *bona fide* purchaser from her husband, if such purchaser, but for his own negligence, would have been aware of her rights.[5] And the creditor's lien upon the property of such a surety will be discharged by any interference on his part with her right of subrogation.[6] As against her husband, she is entitled in equity to have his property first applied to the payment of the debt;[1] and this right will pass to her grantees,[2] and to her creditors and heirs.[3]

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[1] Lewis *v.* Palmer, 28 N. Y. 271; Bowker *v.* Bull, 1 Sim. N. S. 29; McNeale *v.* Reed, 7 Irish Ch. 251; Sheidle *v.* Weishlee, 16 Penn. St. 134; *Woodward, J.*, in Denny *v.* Lyon, 38 Penn. St. 98; Christner *v.* Brown, 16 Iowa, 130; Keel *v.* Levy, 19 Oreg. 450.

[2] McNeale *v.* Reed, 7 Irish Ch. 251; Vartie *v.* Underwood, 18 Barb. (N. Y.) 561.

[3] Neimcewicz *v.* Gahn, 3 Paige (N. Y.), 614; Gahn *v.* Neimcewicz, 11 Wend. (N. Y.) 312; Fitch *v.* Cotheal, 2 Sandf. (N Y.) Ch. 29; Vartie *v.* Underwood, 18 Barb. (N. Y.) 561; Albion Bank *v.* Burns, 46 N. Y. 170; Smith *v.* Townsend, 25 N. Y. 479; Wolfe *v.* Banning, 3 Minn. 202; Van Horne *v.* Everson, 13 Barb. (N. Y.) 526; Savage *v.* Winchester, 15 Gray (Mass.), 453; Gore *v.* Townsend, 105 Nor. Car. 228; Purvis *v.* Carstaphan, 73 Nor. Car. 575; Moffitt *v.* Roche, 77 Ind. 48; Barrett *v.* Davis, 104 Mo. 549; Wilcox *v.* Todd, 64 Mo. 388; Hubbard *v.* Ogden, 22 Kans. 363; Spear *v.* Ward, 20 Calif. 659, 674; Hassey *v.* Wilke, 55 Calif. 525.

[4] Aquilar *v.* Aquilar, 5 Madd. 414.

[5] Carley *v.* Fox, 38 Mich. 387.

[6] Eisenberg *v.* Albert, 40 Ohio St. 631; Union Ins. Co. *v.* Slee, 123 Ills. 57; Hubbard *v.* Ogden, 22 Kans. 363.

§ 105. **Extent to which Subrogation will be carried.** — The subrogation of a surety will not be carried further than is necessary for his indemnity;[4] if he buys up the security at a discount, or makes his payment in a depreciated currency, he can enforce it only for what it cost him.[5] He cannot speculate at the expense of his principal;[6] his only right is to be repaid.[7] Nor will he be subrogated for payments which, when made, were made as gifts to the principal.[8] The extent to which the remedy will be carried for the surety's indemnity will be governed by equitable considerations. A surety who had been subrogated to the rights of a landowner to whom he had been compelled to pay the debt of his principal for land which his principal, a railroad company, had taken under the right of eminent domain, was not allowed to stop the running of trains over the land as the creditor might have done, until he was repaid, because the court saw that this could be of no benefit to him, the company being insolvent and in the hands of a receiver, and the road being operated by a trustee merely for the accommodation of the public, and with a view to a more advantageous sale on foreclosure;[1] for equity will not do that which would be of no benefit to the party asking it, but merely a hardship to the party sought to be coerced.[2] A surety in a bond given in admiralty proceedings who has been compelled to pay the amount of a decree will be subrogated to the rights of the libellant against his principal, but not to the maritime lien which was destroyed by the bond.[3] And a surety who has paid the joint note of his principal and himself cannot reissue it, so as to bind any one but himself, without the consent of his principal.[4]

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[1] Graham *v.* Londonderry, 3 Atk. 393; Hudson *v.* Carmichael, 23 L. J. Ch. 893; McFillin *v.* Hoffman, 42 N. J. Eq. 144; Harrall's Case, 31 N. J. Eq. 101; Shippen's Appeal, 80 Penn. St. 391; Johns *v.* Reardon, 11 Md. 465; Wilcox *v.* Todd, 64 Mo. 388; Allis *v.* Ware, 28 Minn. 166. *Postea*, § 114.

[2] Erie Savings Bank *v.* Roop, 80 N. Y. 591; Medsker *v.* Parker, 70 Ind. 509.

[3] Lancaster *v.* Evors, 10 Beav. 154; Hanford *v.* Bockee, 20 N. J. Eq. 101.

[4] Blake *v.* Traders' Bank, 149 Mass. 250; Borland's Appeal, 66 Penn. St. 470; Southall *v.* Farish, 85 Va. 403; Blow *v.* Maynard, 2 Leigh (Va.), 29.

[5] Dinkgrave's Succession, 31 La. Ann. 703; Kendrick *v.* Forney, 22 Gratt. (Va.) 748; Eaton *v.* Lambert, 1 Nebraska, 339; Martindale *v.* Brock, 41 Md. 571; Hall *v.* Cresswell, 12 Gill & J. (Md.) 36; Butler *v.* Butler, 8 W. Va. 674; Feamster *v.* Withrow, 9 W. Va. 296; Jordan *v.* Adams, 2 English (Ark.), 348; Crozier *v.* Grayson, 4 J. J. Marsh. (Ky.) 514; Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 457; Owings *v.* Owings, 3 *Id.* 590; Bonney *v.* Seely, 2 Wend. (N. Y.) 481.

[6] Reed *v.* Norris, 2 My. & Cr. 361; Gillespie *v.* Creswell, 12 Gill & J. (Md.) 36; Robinson *v.* Sherman, 2 Gratt. (Va.) 178; Coggeshall *v.* Ruggles, 62 Ills. 40; Hicks *v.* Bailey, 16 Tex. 229.

[7] Boltz's Estate, 133 Penn. St. 77; Stanford *v.* Connery, 84 Ga. 732; Batsell *v.* Richards, 80 Tex. 505; Waldrip *v.* Black, 74 Calif. 409.

[8] Scott *v.* Scott, 83 Va. 251.

§ 106. **Surety of Surety may be subrogated, how far.** — A surety of a surety, who has paid and discharged the principal obligation, has the same equity of subrogation to the securities and remedies of the creditor as belonged to the surety for whom he was bound;[5] but he can have no greater rights than his immediate principal would have had.[6] A joint judgment having been recovered against several, one of them, who was originally only a surety, was taken on the execution, and gave a bond with a new surety to obtain his release; and it was held that this new surety, having been compelled to pay the debt, was entitled to be subrogated to the creditor's remedies against the land of the original principal,[7] although this land had been sold by the principal, and had come into the hands of a *bona fide* purchaser for value without notice of the cir-

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[1] Hewitt, *in re*, 25 N. J. Eq. 210.

[2] Joliet & Chicago R. R. Co. *v.* Healy, 94 Ills. 416.

[3] The Robertson, 8 Biss. C. C. 180; Roberts *v.* The Huntsville, 3 Woods C. C. 386; Carroll *v.* The T. P. Leathers, 1 Newb. (Adm.) 432.

[4] Hopkins *v.* Farwell, 32 N. H. 425.

[5] Hall *v.* Smith, 5 How. 96; Rittenhouse *v.* Levering, 6 Watts & Serg. (Penn.) 190; McDaniels *v.* Flower Brook Manufg. Co., 22 Vt. 274; Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398.

[6] Putnam *v.* Tash, 12 Gray (Mass.), 121.

[7] Dodd *v.* Wilson, 4 Del. Ch. 399.

ment of his demand by the surety's property having been taken to pay the principal's debt, will be preferred to that of an assignee of the surety, whose assignment was made after the right of the creditor had accrued.[1]

§ 108. **Creditor cannot discharge Security for his own Benefit after Payment by Surety.** — An indorser of a note which is also secured by a mortgage is entitled to look to the proceeds of the mortgaged premises for his relief;[2] and if in such a case the creditor, after receiving payment from the surety, cancels the mortgage without the surety's consent, so as to leave the land subject to a junior lien for another debt which the creditor holds against the principal debtor, the claim of the surety to have reimbursement out of the land will have priority over the creditor's junior lien.[3] The surety's right of subrogation is superior to the creditor's claim to hold the security for another debt, not covered by the agreement.[4] And one who, as surety for the second indorser of a negotiable note, has been compelled to pay the note, is entitled to a recourse against the first indorser to recover the amount which he has thus paid.[5]

§ 109. **Instances of the Application of the Doctrine of Subrogation for the Protection of Sureties.** — Several parties having united in the purchase of land and given their joint bonds for each one's share of the purchase-money to one of their number, in whom the legal title to the land was vested as their trustee, and one of them having failed to pay his share of the purchase-money, the sureties on his bond, who were his associates in the original purchase, paid it for him; and thereupon it was held that they acquired an equitable title to his share in the land, and that, until they were fully reimbursed for their payment of his share of the purchase-money, neither he nor those claiming under him could demand of the trustee a conveyance of his share or a declaration of trust in his favor.[1] A trustee appointed by a court of chancery to sell certain land sold the same, and took the purchaser's bond with a surety for the payment of the purchase-money, the land not to be conveyed until the purchase-money was paid. This purchaser soon after sold the land for the same sum that he had agreed to pay to the trustee for it, to a sub-purchaser, who, knowing that the trustee had not been satisfied, paid to his own grantor the whole price of the land, and received from the latter an assignment of a claim of his against the owner of the land, which it was thought would be more than sufficient to pay for the land. But the estate turned out to be insolvent; and the dividend upon this claim was not sufficient to pay the purchase-money to the trustee, who accordingly withheld the conveyance from the sub-purchaser, to whom he was ordered by the court to convey the property upon the purchase-money being paid, and sued the surety on the bond of the original purchaser, and recovered a judgment for the unpaid portion of the purchase-money. The surety then claimed that what he was thus compelled to pay should be charged for his reimbursement upon the land in the hands of the sub-purchaser; and it was held that unless this sub-purchaser should pay to the surety the amount of his payment, the land, or so much of it as might be necessary, should be sold to raise that amount; for the sub-purchaser could not by his purchase put the surety for the original purchase-money in a worse position than the latter would otherwise have occupied.[2] A tract of land was sold three times by the successive purchasers thereof, the original vendor retaining the title, and reserving a lien on the land, as well as taking a bond with sureties for the payment of the purchase-money. Under these circumstances, one of these sureties advised a party to buy the land, but gave him no intimation as to the lien. The court held, that, although this advice and concealment might estop that surety from asserting any equity for his own benefit, to the prejudice of the party who purchased it upon his advice, it could not affect the rights of the first vendor, and, the purchase-money having remained unpaid upon each successive sale, that the land might be sold under the first lien, to which the sureties, who had paid the debt secured thereby, were subrogated.[1] But where the vendor had given a full title to the land sold, taking the vendee's bond with two sureties for the payment of the purchase-money, it was held, upon the insolvency and death of the vendee and one of the sureties, and after a sale of the land by a devisee of the vendee to a purchaser with notice of the circumstances, that there was no lien upon which the other surety could hold the land for his indemnification upon the bond.[2]

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[1] Erb's Appeal, 2 Penrose & Watts (Penn.), 296.

[2] Fowler *v.* Scully, 72 Penn. St. 456; Woods *v.* Pittsburg Bank, 83 Penn. St. 57.

[3] Ottawa Bank *v.* Dudgeon, 65 Ills. 11.

[4] Perry *v.* Miller, 54 Iowa, 277; Simmons *v.* Cates, 56 Ga. 609.

[5] Chrisman *v.* Harman, 29 Gratt. (Va.) 494.

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[1] Deitzler *v.* Mishler, 37 Penn. St. 82.

[2] Ghiselin *v.* Fergusson, 4 Harr. & Johns. (Md.) 522.

§ 110. **Surety's Right of Subrogation may be lost by his Waiver.** — The right of a surety to be subrogated to the benefit of the securities and remedies held by the creditor against the principal debtor may be lost by the surety's waiver.[3] If one who claims to be a surety has for a long time allowed himself to be held out as the principal debtor, and other rights have in the mean time accrued against the real principal, it is then too late for him to claim to be subrogated as a surety to the prejudice of those rights.[4] A year's delay in a similar case has been fatal to the rights of the surety, other liens having in the mean time attached upon the estate which the surety desired to hold,[5] and the delay having been

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[1] Kleiser *v.* Scott, 6 Dana (Ky.), 137.

[2] Miller *v.* Miller, Phillips Eq. (Nor. Car.) 85.

[3] Midland Banking Co. *v.* Chambers, L. R. 4 Ch. 398, and L. R. 7 Eq. 179; Douglass's Appeal, 48 Penn. St. 223; Harbeck *v.* Vanderbilt, 20 N. Y. 395.

[4] Smith *v.* Herbin, 124 Ind. 434; Thomas *v.* Stewart, 117 Ind. 50; Goswiler's Estate, 3 Pen. & Watts (Penn.), 200.

[5] Gring's Appeal, 89 Penn. St. 336.

has an election to seek his reimbursement either by subrogation to the remedies of the creditor or by an action against his principal upon the latter's implied promise of indemnity.[1] His failure, upon paying a debt secured by mortgage from the principal debtor, to take either a discharge or an assignment thereof has been held to bar his right to a decree for foreclosure of the mortgage by right of subrogation.[2] Indemnity received by the surety from a stranger will be regarded as cumulative to the rights which the surety already possesses.[3] One who is manifestly a surety will not be deprived of the benefit of subrogation to a mortgage-security held by the creditor, merely because he took other security from the principal,[4] which he afterwards released, and did not ask for an assignment of the mortgage immediately upon his payment of the debt which it secured.[5] But he cannot disregard the rights of other parties which have accrued in the mean time. Thus, if the vendor of land has a lien thereon for the price, a surety of the vendee who pays the price will not be subrogated to this lien, if he has taken other security from the vendee for his protection, and has without objection allowed the vendee to sell the land to another purchaser, although this security afterwards turns out to be insufficient.[6] The election of the surety to claim greater rights under an express agreement than he would acquire by subrogation is a waiver of his right to subrogation.[7] If he refuses to accept the security when offered to him by the creditor, he waives his right to demand it afterwards.[8] And if, after a surety for two principals has paid the debt, he takes from one of the principals a security for his reimbursement, he has been held to waive his right to the benefit of a security which had previously been given by the other principal to the creditor.[1] If he has the means of reimbursement in his own hands, and refuses or neglects to make due application thereof, he cannot come upon another fund by way of subrogation.[2] But a surety who has unsuccessfully attacked for alleged fraud an assignment made by his principal, the benefits of which have been accepted by the creditor, is not thereby estopped from asserting his right of subrogation to the creditor as to these benefits.[3] Nor is it necessary to the surety's subrogation that his payment should have been coerced by an execution; his payment, though voluntarily made, will be regarded as compulsory whenever it could have been enforced.[4]

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[1] Bowers *v.* Cobb, 31 Fed. Rep. 678; Hill *v.* Voorhies, 22 Penn. St. 68; Wernecke *v.* Kenyon, 66 Mo. 275.

[2] Lynn *v.* Richardson, 78 Maine, 367.

[3] Wesley Church *v.* Moore, 10 Penn. St. 273; Cornwall *v.* Gould, 4 Pick. (Mass.) 444; West *v.* Rutland Bank, 19 Vt. 403.

[4] Ballew *v.* Roler, 124 Ind. 557; Hancock *v.* Holbrook, 40 La. Ann. 54.

[5] Crawford *v.* Richeson, 101 Ills. 351; Gossin *v.* Brown, 11 Penn. St. 527.

[6] Henley *v.* Stemmons, 4 B. Mon. (Ky.) 131.

[7] Whitehouse *v.* Edwards, 37 Ch. D. 683; Gorton, *in re*, 40 Ch. D. 536.

[8] Hubbell *v.* Carpenter, 5 N. Y. 171, reversing s. c., 5 Barb. 520, and 2 Barb. 484.

§ 111. **Surety's Right of Subrogation subject to Creditor's Rights.** — It has been held that the surety's right of subrogation to the securities held by the creditor cannot be enforced to the prejudice of an intervening charge taken by the creditor from the principal debtor in ignorance of the suretyship. Thus, where A. and B. had given to a creditor their joint and several note, secured by a mortgage of their respective estates, and then A. gave a separate mortgage of his own estate to a creditor of his own, who afterwards took an assignment of the prior mortgage, and it then appeared that B. had joined in the first note and mortgage merely as the surety of A., and B. claimed that upon paying the first debt he was entitled to be subrogated to the rights of the mortgagee, and to hold the entire mortgaged premises for his indemnity, it was held that, before B. could claim the rights of a surety against A.'s creditor, he must show that the latter knew, or had the means of knowing of the suretyship; and the court said that though a creditor cannot tack to an existing mortgage-debt a demand not secured by the mortgage, nor a subsequent mortgage to a prior one as against an intervening incumbrancer, yet a mortgagee may take another mortgage, which will be valid against an intervening incumbrance implied by equity, of which the mortgagee had neither actual nor constructive notice.[1] But if the creditor had known that B. was merely a surety, though it did not appear upon the face of the papers, that would have been sufficient.[2] Nor will a surety's subrogation to the rights and liens of the creditor be allowed to defeat an interest acquired and held by a third person, when that interest, though subordinate to the creditor's lien, is prior in date to the surety's undertaking.[3] Thus, when a debtor sells property which he had mortgaged for a debt, and then a judgment for the debt having been obtained against him, gives a surety for the judgment, who is afterwards compelled to pay it, this surety cannot be subrogated to the mortgage so as to defeat the purchaser's title, which accrued before the contract of suretyship was entered into;[4] for the subrogation of the surety to the creditor's means of payment rests solely upon principles of justice and equity.[5] But the surety's subrogation will overreach all rights that have accrued since the contract of suretyship was entered into.[6]

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[1] Cornwell's Appeal, 7 Watts & Serg. (Penn.) 305. And see Watts v. Eufaula Bank, 76 Ala. 474.

[2] *Bell, J.*, in Neff v. Miller, 8 Penn. St. 347, 351; Sharp v. Caldwell, 7 Humph. (Tenn.) 415.

[3] Motley v. Harris, 1 Lea (Tenn.), 577.

[4] McNeilly v. Cooksey, 2 Lea (Tenn.), 39; State v. Blakemore, 7 Heisk. (Tenn.) 638.

§ 112. **Surety indebted to his Principal not entitled to Subrogation against him.** — The equitable right of subrogation will not be allowed to a surety who is himself indebted to his principal, against whom he asks to be subrogated, without

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[1] Orvis *v.* Newell, 17 Conn. 97; Budd *v.* Oliver, 23 Atl. Rep. 1105.

[2] Rogers *v.* School Trustees, 46 Ills. 428.

[3] Farmers' Bank *v.* Sherley, 12 Bush (Ky.), 304; Fishback *v.* Bodman, 14 Bush (Ky.), 117; Johnson *v.* Morrison, 5 B. Mon. (Ky.) 106. See *postea*, § 131 *et seq.*

[4] Patterson *v.* Pope, 5 Dana (Ky.), 241; Fishback *v.* Bodman, 14 Bush (Ky.), 117.

[5] Eaton *v.* Hasty, 6 Nebraska, 419.

[6] Pierce *v.* Higgins, 101 Ind. 178.

to the rights and securities of the contract for which he was surety.[1] One who has guaranteed the payment of a promissory note by an indorser thereof will, upon paying the same, have no greater rights against the maker than the indorser himself had.[2] The bail of a defendant cannot look for reimbursement to one who was jointly liable for the original debt.[3] The surety upon a note will not by paying it acquire any rights against the parties to a former note which had been paid by the note upon which he was surety.[4] If one partner, though for the benefit of the partnership, executes a bond with a surety, this surety, on being compelled to pay the bond, acquires thereby no right of action against the other partners.[5] One who is surety both for a firm and for an individual member of the firm has no right to apply upon the individual debt funds of the firm which may come into his hands; but if, having done so, he afterwards applies his own money to the payment of the firm debt, his rights will be the same as if he had paid the latter debt out of the partnership funds.[6] If one who has bound himself as bail for the defendant, in an action against a shipmaster for the value of property lost through the neglect of the officers and crew, is compelled to pay the amount of the judgment against the master, though he will be subrogated to the benefit of the judgment so obtained, and will have the right of recourse against the owners of the ship which the master would have acquired by payment of the judgment, yet he will not be subrogated to the original cause of action against both the master and the owners of the ship.[1] Where the accommodation acceptors of two bills of exchange received a deed of trust as security from the drawer, and one of these bills was taken up by giving a new note with a new surety, the surety upon this new note, after paying it, was not allowed to share in the benefit of the original security.[2] If the note of a principal, with three sureties, is discharged at maturity by giving another note with only two of the sureties, the third surety having died before the first note fell due, the estate of the latter will not be liable to contribute upon the insolvency of the principal and the payment of the new note by the sureties thereon, although when they executed the new note they supposed that the estate of the third surety would be liable thereon.[3] If two executors have given a joint and several bond for their faithful administration, and after the death of one of them the survivor has wasted the estate, the sureties, after satisfying a judgment recovered upon the bond against the survivor and themselves for such waste, will have no right of action against the estate of the deceased executor, either for indemnity or contribution,[4] though if this executor had lived their rights upon the bond would have been complete against him.[5]

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[1] Wagner *v.* Elliott, 95 Penn. St. 487; Carlton *v.* Simonton, 94 Nor. Car. 401; McMullen *v.* Cathcart, 4 Rich. Eq. (So. Car.) 117; Matthews *v* Colburn, 1 Strobh. (So. Car.) 258; Duncan *v.* Lewis, 1 Duv. (Ky.) 183; Bank of England *v.* Tarleton, 23 Miss. 173; Gerdone *v.* Gerdone, 70 Ind. 62; Noble *v.* Murphy, 52 No. W. Rep. 148; Gunn *v.* Geary, 44 Mich. 615; Old *v.* Chambliss, 3 La. Ann. 205; Trent *v.* Calderwood, 2 La. Ann. 942.

[2] Dewey *v.* Living, 3 Allen (Mass.), 22; Putnam *v.* Tash, 12 Gray (Mass.), 121; Nelson *v.* Harrington, 16 Gray, 139.

[3] Cunningham *v.* Clarkson, Wright (Ohio), 217.

[4] Barnett *v.* Reed, 51 Penn. St. 190; Merriman *v.* Social Manufacturing Co., 12 R. I. 175.

[5] Leggett *v.* Humphreys, 21 How. 66; Tom *v.* Goodrich, 2 Johns. (N. Y.) 213; Bowman *v.* Blodgett, 2 Met. (Mass.) 308; Osborn *v.* Cunningham, 4 Dev. & Bat. Law (Nor. Car.), 423; Foley *v.* Robards, 3 Ired. Law (Nor. Car.), 177; Krafts *v.* Creighton, 3 Rich. Law (So. Car.), 273; Adair *v.* Campbell, 4 Bibb (Ky.), 13.

[6] Downing *v.* Linville, 3 Bush (Ky.), 472.

§ 114. **Surety's Right to marshal Securities given to the same Creditor for Separate Debts.** — Where a debtor gives to his creditor collateral securities for the payment of the debt, and afterwards borrows of the same creditor a further sum of money, for the payment of which he gives a surety, the surety, if called upon to pay the second debt, is entitled to the surplus of the securities over the amount needed to satisfy the first debt.[1] The surety for only one loan, if he has been obliged to pay that loan, has a right, against the principal debtor or his representatives, to marshal the securities given by the principal to the creditor for several successive loans, so as to obtain reimbursement for himself out of the balance of the several securities, after the creditor is satisfied.[2] The purchaser of several lots of land having given his separate note for each lot with the same indorser, and the lots having been afterwards resold for his default in the payment of these notes, and some of the lots having brought more and some less than the first contract price, this indorser was allowed to marshal the proceeds of these sales, so as to make good the deficiency of one set by the surplus of the other.[3] So where husband and wife have given security for the husband's debt upon the property of each, she may require the creditor to sell her husband's property before resorting to hers.[4]

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[1] Tardy *v.* Allen, 3 La. Ann. 66.

[2] Houston *v.* Huntsville Bank, 25 Ala. 250.

[3] Hutchings *v.* McCauley, 2 Dev. & Bat. Eq. (Nor. Car.) 399.

[4] Brazer *v.* Clark, 5 Pick. (Mass.) 96; Towne *v.* Ammidown, 20 Pick. (Mass.) 535.

[5] McCoun *v.* Sperb, 53 Hun (N. Y.), 165. *Postea*, § 202.

§ 115. **Surety cannot require the Creditor to resort first to Security.** — The right of the surety does not extend to requiring the creditor to exhaust the security given to him by the principal debtor for the payment of the debt before coming upon the surety.[5] The subrogation of the surety will never be allowed to the prejudice of the creditor's right to collect his debt;[6] the latter may proceed against the surety person-

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[1] Praed *v.* Gardiner, 2 Cox Ch. Cas. 86.

[2] Heyman *v.* Dubois, L. R. 13 Eq. 158.

[3] Smith *v.* Arden, 5 Cranch, C. C. 485.

[4] Erie Savings Bank *v.* Roop, 80 N. Y. 591; Payne *v.* Burnham, 62 N. Y. 74; Neimcewicz *v.* Gahn, 3 Paige (N. Y.), 614; Shinn *v.* Smith, 79 Nor. Car. 310. *Antea*, § 104.

[5] Koehler *v.* Farmers' Bank, 51 Hun (N. Y.), 418; Gary *v.* Cannon, 3 Ired. Eq. (Nor. Car.) 64; Miller *v.* White, 25 So. Car. 235; Armstrong *v.* Poole, 30 W. Va. 666; Hardy *v.* Overman, 36 Ind. 549; Sayre *v.* McEwen, 41 Ind. 109; Roberts *v.* Jeffries, 80 Mo. 115; Dougherty *v.* Mackenzie, 34 Mo. 462; Speight *v.* Porter, 26 Miss. 286.

[6] New Bedford Savings Bank *v.*

the notes from the surety.[1] Indeed, the right of distress has been held to be the mere personal privilege of the landlord, and not to pass by subrogation to the surety.[2]

§ 116. **Right of Subrogation destroyed by Application of the Security upon the Debt.** — Although the surety is entitled to the benefit of a security held by the creditor for the payment of the debt, yet if the whole security has been applied upon the debt without paying it in full, and the surety has been compelled to make up the deficiency, he cannot then resort to the security for subrogation or contribution;[3] for this would so far defeat the very object, the payment of the debt, for which the security was taken.[4] And if the debt is paid by the principal debtor, a mortgage held by the creditor to secure its payment is thereby extinguished;[5] and an assignment of it by the surety to secure money borrowed by him on his individual account is invalid, especially if the lender knew before such assignment that the original debt had been paid.[6]

§ 117. **Creditor's Right to apply Security as needed for his own Protection.** — A creditor who holds against the same debtor several securities for different debts, on which there are distinct sureties, may obtain security or satisfaction, by attachment and judgment or otherwise, of one debt in full, and yet retain his entire claim upon the surety for the others. Neither law nor equity requires that such a payment shall be considered to have been made for the benefit of all the sureties ratably.[7] The holder of one security for different demands may apply the security upon whichever debt he chooses, and still hold a surety upon the others.[1] And where a debtor gave to one creditor a mortgage of two funds and also a covenant by a surety, and then gave a second mortgage of one of the funds to another creditor, and, the second creditor's fund having been exhausted by part payment of the first creditor's debt, the surety paid the balance due to the first creditor and took a transfer of the first mortgage, it was held that the second creditor had a right to marshal the securities against the surety, and that the second creditor's right to be subrogated to the first fund was superior to the surety's equity.[2] Where the creditor, holding a surety for the payment of his debt, took from the debtor a mortgage to secure both this and an additional indebtedness, it was held that the surety would have no right of subrogation to this mortgage until both debts had been paid to the creditor; and the creditor was allowed to apply all the proceeds of the security upon the second indebtedness, and still to hold the surety for the first.[3] A surety upon an appeal-bond whose liability has become fixed, cannot require the creditor to apply towards the satisfaction of the bond a partial payment obtained from the property of the principal defendant, but is responsible for the unsatisfied damages arising on the appeal to the full amount of the bond.[4] If a mortgage runs jointly to the creditor and the surety, and is conditioned for the payment both of a note given by the mortgagor to the creditor and of another note given by the mortgagor and the

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[1] Hall *v.* Hoxsey, 84 Ills. 616; Brooks *v.* Carter, 36 Ala. 682.

[2] Russell, *in re*, 29 Ch. D. 254; Newman *v.* Greenville Bank, 66 Miss. 323; Wohner *v.* Handy, 68 Miss. 153.

[3] Sawyers *v.* Baker, 72 Ala. 49; Marshall *v.* Dixon, 82 Ga. 435; Schaeffer *v.* Bond, 72 Md. 501.

[4] Marchand *v.* Frellsen, 105 U. S. 423; Stafford *v.* New Bedford Savings Bank, 132 Mass. 315; Belcher *v.* Hartford Bank, 15 Conn. 381; Stirewalt *v.* Martin, 84 Nor. Car. 4; Landry *v.* Victor, 30 La. Ann., pt. II., 1041; Whan *v.* Irwin, 27 id. 706.

[5] Tarbell *v.* Parker, 101 Mass. 165; Shackleford *v.* Stockton, 6 B. Mon. (Ky.) 390.

[6] Kinley *v.* Hill, 4 Watts & Serg. (Penn.) 426.

[7] *Shaw, C. J.*, in Dalton *v.* Wo-

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burn Association, 24 Pick. (Mass.) 257; Harding *v.* Tifft, 75 N. Y. 461; Hansen *v.* Rounsavell, 74 Ills. 238. But see Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9.

[1] Hanson *v.* Manley, 72 Iowa, 48; Bryan *v.* Henderson, 88 Tenn. 23, 28; Mathews *v.* Switzler, 46 Mo. 301; s. p. in Mosher *v.* Hotchkiss, 3 Abbott (N. Y.), App. Dec. 326.

[2] South *v.* Bloxam, 2 Hem. & Mill. 457. So in Hanford *v.* Robertson, 47 Mich. 100. But the surety's right is not usually so much restricted. *Antea*, §§ 86, 111.

[3] Stamford Bank *v.* Benedict, 15 Conn. 437.

[4] Sessions *v.* Pintard, 18 How. 106; Ives *v.* Merchants' Bank, 12 How. 159.

surety to the creditor, the surety cannot, upon paying the note for which he is liable, assert any rights under this mortgage against the creditor, until the creditor's other note is paid; if the surety wishes to avail himself of the mortgage, he must, on default of the debtor, pay the latter note also.[1] But if several debts are secured by a mortgage given by the principal debtor, and for some of the debts there are sureties who are not parties to the mortgage, the mortgagee is sometimes regarded as a trustee of the sureties for the security thus provided for their indemnity, and bound to apply a just proportion of its proceeds upon the debts for which the sureties are liable, operating a payment of these debts *pro tanto*, and discharging the sureties to that extent.[2] If property is deposited with the creditor by the principal debtor, to be applied upon an indebtedness on which there is a surety, the creditor has no right against the surety to apply this upon another debt on which the principal alone is liable.[3] And the proper application, once made, cannot be afterwards changed, so as to revive the obligation of the surety.[4]

§ 118. **Surety for Part of a Debt cannot be subrogated, while the other Part remains unpaid.** — A surety for part of the debt is not entitled to the benefit of a security given by the debtor to the creditor at a different time for another part of the debt.[5] A vendor of land took the notes of the vendee without any other security for the payment of the purchase-money, retaining only a lien upon the land to secure the payment of the notes. Regarding the land as an insufficient security he brought an action upon the first one of these notes, and attached property of the vendee of the value of one thousand

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[1] Root *v.* Stow, 13 Metcalf (Mass.) 5.

[2] Fielder *v.* Varner, 45 Ala. 429; Cory *v.* Leonard, 56 N. Y. 494.

[3] Rosborough *v.* McAliley, 10 So. Car. 235; Wetherell *v.* Joy, 40 Maine, 325, 328.

[4] Miller *v.* Montgomery, 31 Ills. 350.

[5] Wade *v.* Coope, 2 Sim. 155. See also Grubbs *v.* Wysors, 32 Gratt. (Va.) 127; Parker *v.* Mercer, 6 How. (Miss.) 320; Welch *v.* Parran, 2 Gill (Md.) 320.

in every security which the creditor holds against the principal debtor, whether the surety has known of its existence or not, so, if the creditor interferes with the surety's right of subrogation by parting with any such security without the consent of the surety, the surety is thereby discharged to the extent of the value of such security.[1] Not only an actual parting with the security, but any dealing with it such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect.[2] The surety is entitled to the benefit of all the securities in the hands of the creditor; and if any of these are lost by the creditor's acts or neglect, the surety is discharged to the extent to which the acts of the creditor may have prejudiced his recourse for the reimbursement of what he may be obliged to pay under his contract of suretyship,[3] but only to this extent.[4] The surety will not be discharged by what cannot injure him.[5] Accordingly, the creditor will not discharge the surety by making an exchange of securities with the principal debtor, whereby he obtains a more valuable security than he gives up.[6] Any affirmative act of the creditor by which a security of which the surety might have availed himself is put out of the latter's reach operates as a discharge of the surety *pro tanto*,[1] but only *pro tanto*.[2] And this principle is now generally extended to securities taken by the creditor after the contract of suretyship has been made,[3] although it has been determined in England, contrary to the usual doctrine,[4] that the creditor is not bound to retain for the protection of the surety securities for the debt which he may have acquired from the principal debtor subsequently to the contract of suretyship, and which, while the creditor holds them, the surety does not call upon him to enforce; and that a creditor who, having taken a further security from the principal after the contract of suretyship was made, afterwards parts with that security, does not thereby discharge the surety, either wholly or *pro tanto*.[5]

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[1] Wulff *v.* Jay, L. R. 7 Q. B. 756, 762; Bechervaise *v.* Lewis, L. R. 7 C. P. 372, 377; Fitchburg Savings Bank *v.* Torrey, 134 Mass. 239; Grow *v.* Garlock, 97 N. Y. 81; Griswold *v.* Jackson, 2 Edw. Ch. (N. Y.) 461; Fegley *v.* McDonald, 89 Penn. St. 128; Smith *v.* McLeod, 3 Ired. Eq. (Nor. Car.) 390; Ruble *v.* Norman, 7 Bush (Ky), 582; Dillon *v.* Russell, 5 Nebraska, 484; Burr *v.* Boyer, 2 Nebraska, 265; Allen *v.* Henley, 2 Lea (Tenn.), 141.

[2] Pledge *v.* Buss, Johns. (Eng. Ch.) 663; Hutchinson *v.* Woodwell, 107 Penn. St. 509; Mellendy *v.* Austin, 69 Ills. 15; Foss *v.* Chicago, 34 Ills. 488; Johnson *v.* Young, 20 W. Va. 614; Roberson *v.* Tonn, 76 Tex. 535; Hubbard *v.* Pace, 34 Ark. 80; Lafayette County *v.* Hixon, 69 Mo. 581; Cordaman *v.* Malone, 63 Ala. 556.

[3] Nichols *v.* Burch, 128 Ind. 324; Armor *v.* Amis, 4 La. Ann. 192; Pratt's Succession, 16 La. Ann. 357; Chaffe *v.* Taliaferro, 58 Miss. 544.

[4] Blydenburgh *v.* Bingham, 38 N. Y. 371; Dobson *v.* Chambers, 79 Nor. Car. 142; Barrow *v.* Shields, 13 La. Ann. 57.

[5] Cambridge Savings Bank *v.* Hyde, 131 Mass. 77; Heath *v.* Griswold, 18 Blatchf. C. C. 555.

[6] Thomas *v.* Cleveland, 33 Mo. 126.

§ 120. **Creditor held to Responsibilities of Trustee for Surety.** — The creditor who, holding the engagement of a surety, takes also from the principal debtor collateral security for the payment of the debt, is bound to hold the property which he so takes in trust, not only for his own benefit, but also for the protection of the surety.[6] He must act with good faith towards the surety as his *cestui que trust*, and hold the fund fairly and impartially for the benefit of the surety as well as of himself. He must account to the surety for the value of the property, not only if he parts with it, or surrenders it without the consent of the surety, or does any affirmative act in violation of the trust upon which he holds it,[1] but also for his negligence, or omission to perform any act, whereby the surety's recourse to the fund is prejudiced.[2] Though mere non-action by the creditor will not ordinarily release the surety,[3] yet, if it is such non-action as to render unproductive some collateral security, such as a mortgage, held for the payment of the debt, this will be an available defence for the surety, at least *pro tanto.*[4] If he waives his security by proving his claim as an unsecured one against the estate of the principal debtor, in bankruptcy, this will discharge the surety to the extent of the value of the security thus released,[5] though it has been held that the creditor is none the less entitled to exercise his option of surrendering the security and proving in full against the principal's estate because he holds a surety, and that the surety will not be discharged by such proof.[6] The right of the creditor against

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[1] Allen *v.* O'Donald, 23 Fed. Rep. 573; Philbrook *v.* McEwen, 29 Ind. 347; Guild *v.* Butler, 127 Mass. 386; Marbury *v.* Ehlen, 72 Md. 206; Watson *v.* Reed, 4 Baxter (Tenn.), 49; Cullum *v.* Emanuel, 1 Ala. 23.

[2] Allen *v.* O'Donald, 28 Fed. Rep. 17; Bedwell *v.* Gephart, 67 Iowa, 44.

[3] Scanland *v.* Settle, Meigs (Tenn.), 169; Pearl St. Society *v.* Imlay, 23 Conn. 10; May *v.* White, 40 Iowa, 246; Springer *v.* Toothaker, 43 Maine, 381; Sherradeen *v.* Parker, 24 Iowa, 28; Nelson *v.* Williams, 2 Dev. & Bat. Eq. (Nor. Car.) 118.

[4] *Antea*, §§ 86, 87.

[5] Newton *v.* Chorlton, 10 Hare, 646.

[6] Kesler *v.* Linker, 82 Nor. Car. 456; Pipkin *v.* Bond, 5 Ired. Eq. (Nor. Car.) 91; Holland *v.* Johnson, 51 Ind. 346; Willis *v.* Davis, 3 Minn. 17; McMullen *v.* Hinkle, 39 Miss. 142; Hardin *v.* Eames, 5 Ills. App. 153.

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[1] Otis *v.* Von Storch, 15 R. I. 41; Humphrey *v.* Hayes, 94 N. Y. 594; Wharton *v.* Duncan, 83 Penn. St. 40; Sample *v.* Cochran, 84 Ind. 594, and 82 *Id.* 260; Nelson *v.* Munch, 28 Minn. 314.

[2] Strange *v.* Fooks, 4 Giff. 408; Watts *v.* Shuttleworth, 5 Hurl. & Nor. 235; S. C., on error, 7 Hurl. & Nor. 353; Taylor *v.* Scott, 62 Ga. 39; Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24; Phares *v.* Barbour, 49 Ills. 370; Brockman *v.* Sieverling, 6 Ills. App. 512; Sherradeen *v.* Parker, 24 Iowa, 28; Saulet *v.* Trepagnier, 2 La. Ann. 427.

[3] Trent Navigation Co. *v.* Hurley, 10 East, 34; Allen *v.* Brown, 124 Mass. 77; Watertown Ins. Co. *v.* Simmons, 131 Mass. 85; Chapin *v.* Livermore, 13 Gray (Mass.), 561; Taylor *v.* State, 73 Md. 208; Kelser *v.* Linker, 82 Nor. Car. 456; Cherry *v.* Miller, 7 Lea (Tenn.), 305; Grisard *v.* Hinson, 50 Ark. 229; McKecknie *v.* Ward, 58 N. Y. 541; Clark *v.* Sickler, 64 N. Y. 231; Schroeppell *v.* Shaw, 3 N. Y. 446; Deck *v.* Works, 18 Hun (N. Y.), 266; Canton Bank *v.* Reynolds, 13 Ohio, 84; Kirby *v.* Studebaker, 15 Ind. 45; Vason *v.* Beall, 58 Ga. 500; Pickens *v.* Finney, 12 Sm. & M. (Miss.) 468; Clopton *v.* Spratt, 52 Miss. 251; Buckalew *v.* Smith, 44 Ala. 638; Humphreys *v.* Crane, 5 Calif. 173; Parker *v.* Alexander, 2 La. Ann. 188; Murrell *v.* Scott, 51 Tex. 520; Hunter *v.* Clark, 28 Tex. 159; Terrel *v.* Townsend, 6 Tex. 149.

[4] Lumsden *v.* Leonard, 55 Ga. 374; City Bank *v.* Young, 43 N. H. 457; Russell *v.* Weinberg, 2 Abbott, New Cas. (N. Y.) 422; Ramsey *v.* Westmoreland Bank, 2 Pen. & Watts (Penn.), 203; Gillespie *v.* Darwin, 6 Heisk. (Tenn.) 21; Merchants' Bank *v.* Cordeviolle, 4 Rob. (La.) 506.

[5] Jones *v.* Hawkins, 60 Ga. 52. See Phoenix Manufg. Co. *v.* Fuller, 3 Allen (Mass.), 441.

[6] Rainbow *v.* Juggins, 5 Q. B. Div. 138; S. C. affirmed on appeal, 5 Q. B.

resulted in the loss of any means of payment to which the surety, on discharging the debt, would have the right to be subrogated, the creditor's claim upon him will not be affected.[1] And as laches cannot be imputed to the government,[2] the failure of a county court to take a mortgage on unincumbered real estate, as was required by statute, to secure the payment of school-money loaned, will not discharge a surety for the loan.[3] And though a rule of court requires that a recognizance should be taken and recorded for the payment of the rent of property in charge of the court, a failure of the clerk of the court to record such a recognizance, whereby a lien for the rent upon the property of the lessee is lost, will not discharge a surety for the payment of the rent from his liability.[4] So, where an order of court, made in pursuance of a statute, provided that a mortgage should be taken for the purchase-money of property sold at an administrator's sale, a surety for the purchase-money was not released by the fact that, contrary to his expectation, no such mortgage was taken, no misrepresentation having been made to him.[5] But the creditor is not required to do more for the protection of the surety than to preserve the force and validity of the security furnished by the debtor; it is enough if he is able to produce the security in as good condition as he received it.[6]

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v. Morrow, 4 Ind. 425; Lamberton *v.* Windom, 18 Minn. 506; *Crounse, J.*, in Burr *v.* Boyer, 2 Nebraska, 265; Chichester *v.* Mason, 7 Leigh (Va.), 244; Lee *v.* Baldwin, 10 Ga. 208; Pickens *v.* Yarborough, 26 Ala 417; Noland *v.* Clark, 10 B. Mon. (Ky) 239; Wood *v.* Morgan, 5 Sneed (Tenn.), 79; Hill *v.* Bourcier, 29 La. Ann. 841; Watson *v.* Allcock, 1 Sm. & Giff. 319; s. c., on appeal, 4 De G., M. & G. 242.

[1] Pottawattamie Co. *v.* Taylor, 47 Iowa, 520.

[2] Osborne *v.* United States, 19 Wall. 577, 581; Ganssen *v.* United States, 97 U. S. 584.

[3] Marion County *v.* Moffett, 15 Mo. 604.

[4] Jephson *v.* Maunsell, 10 Irish Eq. 38, and (on appeal) 132.

[5] Wornell *v.* Williams, 19 Tex. 180. See Reynolds *v.* Dechaums, 24 Tex. 174.

[6] Clark *v.* Young, 1 Cranch, 181; Ormsby *v.* Fortune, 16 Serg. & R. (Penn.) 302; Trotter *v.* Crockett, 2 Porter (Ala.), 401.

§ 122. **Creditor's Discharge of Levy or Attachment on the Property of the Principal, how far a Discharge of the Surety.** — If the creditor releases the levy of an execution for the debt upon property of the principal sufficient to satisfy the debt, this will discharge the surety;[1] for this is a security which the surety can require the creditor to preserve.[2] Much less can the creditor, to the injury of the surety, discharge the levy, so as to let in another debt due to himself,[3] or by assigning his judgment to another person enable the latter, by discharging the levy, to save another debt out of the property, to the loss of the surety.[4] A release of property upon which the judgment is a lien will have the same effect as if the property had been actually levied upon.[5] If the lien of the judgment upon the land of the principal debtor has been lost by the creditor's having proved it as an unsecured debt against the estate of the principal in bankruptcy, this will discharge the surety to the extent of the injury thereby resulting to him, but only to this extent.[6] And it has been held that after a levy upon property of the principal, a delivery of such property by the sheriff to the principal debtor will discharge the surety to the extent of the value of this property; for if the creditor was not in fault, the sheriff will be liable to him, and the surety should be released; if the creditor was in fault, then *a fortiori* the surety should be released,[1] though the doctrine is not commonly carried to this extent.[2] But the mere failure of the officer through negligence to make the money out of the property of the principal will not discharge the surety.[3] If the delay or dismissal of the levy does not annul the lien of the judgment upon the property, then, as the rights of the surety are not thereby affected, he will not be discharged from his liability;[4] a mere suspension of execution will not discharge the surety,[5] unless it is the result of an agreement of the creditor with the principal debtor not to issue execution, or not to attempt collection from him.[6] Some act of interference with the surety's right of subrogation to a security or a remedy must be shown to operate his discharge by reason of the creditor's neglect in pursuing the principal or his property.[7] The lien of an attachment for the debt obtained by the creditor upon the property of the principal debtor is a security for the debt[8] which will inure to the benefit of the surety; and its discharge will release the surety, at least *pro tanto.*[9] Some courts have indeed held that the release by the creditor of an attachment upon the property of the principal will not dis-

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[1] Spangler *v.* Sheffer, 69 Penn. St. 255; McKenzie *v.* Wiley, 27 W. Va. 658; Farmers' Bank *v* Kingsley, 2 Doug. (Mich.) 379; Hutton *v.* Campbell, 10 Lea (Tenn.), 170; Stockard *v.* Granberry, 3 *Id.* 668; Holt *v.* Manier, 1 *Id.* 488; Winston *v.* Yeargin, 50 Ala. 340; Mulford *v.* Estudillo, 23 Calif. 94.

[2] Stephens *v.* Monongahela Bank, 88 Penn. St. 157; Shutts *v.* Fingar, 100 N. Y. 539, 546; Spring *v.* George, 50 Hun (N. Y.), 227; Day *v.* Ramey, 40 Ohio St. 446; Moorman *v.* Wood, 117 Ind. 144; Cooper *v.* Wilcox, 2 Dev. & Bat. Eq. (Nor. Car.) 90; Winston *v.* Yeargin, 50 Ala. 340; Curan *v.* Colbert, 3 Ga. 239; Brown *v.* Riggins, 3 Ga. 405; Morley *v.* Dickinson, 12 Calif. 561; Moss *v.* Pettingill, 3 Minn. 217; Harrison Machine Works *v.* Templeton, 82 Tex. 443; Jenkins *v.* McNeese, 34 Tex. 189.

[3] McMullen *v.* Hinkle, 39 Miss. 142.

[4] Nelson *v.* Williams, 2 Dev. & Bat. Eq. (Nor. Car.) 118.

[5] Holt *v.* Bodey, 18 Penn. St. 207; Hollingsworth *v.* Tanner, 44 Ga. 11; McMullen *v.* Hinkle, 39 Miss. 142; Robeson *v.* Roberts, 20 Ind. 155.

[6] Jones *v.* Hawkins, 60 Ga. 52.

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[1] Lumsden *v.* Leonard, 55 Ga. 374; Ramsey *v.* Westmoreland Bank, 2 Pen. & W. (Penn.) 203; Lackey *v.* Steere, 121 Ills. 598.

[2] Raddy *v.* Whitney, 4 E. D. Smith (N. Y.), 378.

[3] Kindt's Appeal, 102 Penn. St. 441; Moss *v.* Craft, 10 Mo. 720; Bank of Alabama *v.* Godden, 15 Ala. 616; Grieff *v.* Steamboat Stacy, 12 La. Ann. 8.

[4] Wyley *v.* Stanford, 22 Ga. 385; Summerhill *v.* Tapp, 52 Ala. 227; Ambler *v.* Leach, 15 W. Va. 677.

[5] Wilson *v.* Eads, Hempst. 284; Brown *v.* Chambers, 63 Tex. 131; Hetherington *v.* Mobile Bank, 14 Ala. 68; Crawford *v.* Gaulden, 33 Ga. 173; Jerauld *v.* Trippett, 62 Ind. 122; Manice *v.* Duncan, 12 La. Ann. 715; Humphrey *v.* Hitt, 6 Gratt. (Va.) 509; Sharp *v.* Fagan, 3 Sneed (Tenn.), 541.

[6] Evans *v.* Raper, 74 Nor. Car. 639; Sterne *v.* Vincennes Bank, 79 Ind. 549; Blazer *v.* Bundy, 15 Ohio St. 57; Storms *v.* Thorn, 3 Barb. (N. Y.) 314.

[7] Jackson *v.* Patrick, 10 So. Car. 197; Dills *v.* Cecil, 4 Bush (Ky.), 579.

[8] Cook, *in re*, 2 Story, C. C. 376.

[9] Templeton *v.* Shakley, 107 Penn. St. 370; Springer *v.* Toothaker, 43 Maine, 381; Maquoketa *v.* Willey, 35 Iowa, 323; Ashby *v.* Smith, 9 Leigh (Va.), 164; Missouri Bank *v.* Matson, 24 Mo. 333.

in his hands money or property of the principal debtor, which he may rightfully retain and apply to the payment of the debt, without violating any duty or subjecting himself to any action, the surety may require it to be so applied;[1] and if the creditor, instead of retaining it, suffers it to pass into the possession of the principal, the surety is thereby to that extent discharged;[2] but this must be property on which the creditor has a lien, to which the surety, on payment by him, can be subrogated.[3] Thus, a corporation which has the option to prevent the transfer of stock by its shareholders who are indebted to it, but has never exercised that option, will not lose its right to hold a surety for an indebtedness of one of its stockholders by allowing the latter to transfer his stock, the surety never having called upon the corporation to enforce its possible lien.[4] A creditor who holds a judgment against principal and surety does not release the surety by employing the principal to do work for him, and then paying the principal for such work in accordance with an agreement to do so, instead of setting it off against his judgment.[5] Nor will he discharge the surety by purchasing property of the principal and paying him for it, before the debt for which the surety is liable becomes due and payable.[6] Where, after the contract of suretyship had been made, the principal debtor gave to the creditor, as new security, a mortgage of real estate, under an agreement that the creditor should surrender this mortgage when the debtor should furnish other sufficient security in its place, and afterwards, on the debtor's furnishing the indorsement of a responsible person, the creditor gave up this mortgage, it was held that this surrender of a security did not release the original surety, because the creditor, under the agreement by which he acquired it, had no right to retain it after other sufficient security had been furnished.[1] So, where principal and surety were indebted to a bank on a note which was overdue, and the principal deposited more than the amount of the note with the bank, on the express agreement that this deposit should be applied to meet certain checks which were to be drawn against it, the bank's application of this deposit to the payment of such checks would not release the surety.[2] And the surrender by the creditor of a forged or fraudulent bond or other similar security given to him by the principal debtor, which could not have been enforced against the obligor therein, will not release the surety.[3] In all these cases, if the creditor had preserved the property or means of payment in his own hands, and then collected the debt from the surety, the latter would have had no right of subrogation to these resources; and therefore he was not released by their surrender. Even a payment made to the creditor by the principal debtor, if afterwards avoided and recovered back as a fraudulent preference, has been held not to operate a discharge of the surety.[4] But since, if the principal debtor were insolvent, his set-off against the creditor would be available to the surety,[5] it has been held that an insurance company holding the note of a deceased policy-holder for money lent to him, and knowing that his estate is insolvent, is bound to retain the money due on the note out of the amount payable to the administrator of the deceased upon the policy; and its neglect so to do will discharge a surety upon the note.[1]

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[1] Redman *v.* Turner, 65 Nor. Car. 445; Allen *v.* Smitherman, 6 Ired. Eq. (Nor. Car.) 341; Henderson *v.* Huey, 45 Ala. 275.

[2] Law *v.* East India Co., 4 Vesey, 824; Kinnaird *v.* Webster, 10 Ch. Div. 139; Bixby *v.* Barklie, 26 Hun (N Y.), 275; Brown *v.* Rathburn, 10 Oreg. 158; Jones *v.* Findley, 84 Ga. 52; Crim *v.* Fleming, 101 Ind. 154; Kiessig *v.* Allspaugh, 91 Calif. 231; Spalding *v.* Bank of Susquehanna, 9 Penn. St. 28; Richards *v.* Commonwealth, 40 Penn. St. 146.

[3] Tenant *v.* Tenant, 110 Penn St. 478; Clow *v.* Derby Coal Co., 98 Penn. St. 432; McShane *v.* Howard Bank, 73 Md. 135; Street *v.* Old Town Bank, 67 Md. 421; Coombs *v.* Parker, 17 Ohio, 289; Foster *v.* Gaston, 123 Ind. 96; Ætna Bank *v.* Hollister, 55 Conn. 188; Glazier *v.* Douglass, 32 Conn. 393; Beaubien *v.* Stoney, Speers Eq (So. Car.) 508; Taylor *v.* Jeter, 23 Mo. 244; Goodacre *v* Skinner, 47 Kans. 575.

[4] Perrine *v.* Mobile Ins. Co., 22 Ala 575.

[5] Hollingsworth *v.* Tanner, 44 Ga. 11.

[6] Echols *v.* Head, 68 Ga. 152; Higdon *v.* Bailey, 26 Ga. 426.

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[1] Pearl St. Society *v.* Imlay, 23 Conn. 10. So in Adams *v.* Dutton, 57 Vt. 515; Phœnix Ins. Co. *v.* Holloway, 51 Conn. 310.

[2] Wilson *v.* Dawson, 52 Ind. 513.

[3] Loomis *v.* Fay, 24 Vt. 240.

[4] Petty *v.* Cook, L. R. 6 Q. B. 790.

[5] *Antea,* § 101; Walsh *v.* Colquitt, 64 Ga. 740.

§ 124. **Neglect of a Bank to apply Deposits of the Principal upon his Note, how far a Release of the Surety.** — It has been held that the neglect of a bank to apply the funds of the principal debtor deposited with itself to the payment of his note due to the bank will discharge the sureties and indorsers upon such note, on the ground that the bank had a lien upon these funds for the payment of the note, which it might have enforced, and which therefore the surety could require it to exercise for his protection.[2] This has, however, been denied on the ground that such appropriation is purely optional with the bank,[3] which cannot be compelled to violate the terms upon which the money was obviously placed in the bank, for the payment to the depositor's checks.[4] The bank being the absolute owner of the money deposited, and being a mere debtor to the depositor for the balance of his account, holds no property in which the depositor has any title or right of which a surety on an independent debt of the depositor to the bank can avail himself by subrogation.[5] The true principle is laid down in an English case,[6] that if the circumstances show that a bond given by a depositor to a bank was intended

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[1] White *v.* Life Association of America, 63 Ala. 419.

[2] Kinnaird *v.* Webster, 10 Ch. Div. 139; German Bank *v.* Foreman, 138 Penn. St. 474; Commercial Bank *v.* Henninger, 105 Penn. St. 496; McDowell *v.* Wilmington Bank, 1 Harringt. (Del.) 369; Dawson *v.* Real Estate Bank, 5 Pike (Ark.), 283.

[3] *Antea*, §§ 92, 123.

[4] Newburg Bank *v.* Smith, 66 N. Y. 271; Fishkill Bank *v.* Speight, 47 N. Y. 668; Steiner *v.* Erie Savings Co., 98 Penn. St. 591; Grissom *v.* Commercial Bank, 87 Tenn. 350; Martin *v.* Mechanics' Bank, 6 Harr. & Johns. (Md.) 235; Voss *v.* German Bank, 83 Ills. 599.

[5] Mahaiwe Bank *v.* Peck, 127 Mass. 298, 301; Lafayette Bank *v.* Hill, 76 Ind. 223.

[6] Henniker *v.* Wigg, 4 Q. B. (Ad. & El N. S.) 792.

lects it again of the principal debtor, the surety cannot then recover back his payment, because this, when made, was rightfully received by the creditor.[1]

§ 126. **Instances where Surety discharged by Creditor's Interference with his Right of Subrogation.** — The vendor of slaves sold in a lump for a round sum, received from the purchaser a note for the price, indorsed by a third person as surety for the payment thereof, and subsequently repurchased some of the slaves from his vendee; and it was held that as the vendor's right of rescission, or lien upon the property for the price, was indivisible, and could not be exercised upon merely a part of the property which had been sold in a lump for a round sum, he had, by his repurchase, destroyed the surety's right of subrogation to this privilege, and so released the latter from his liability.[2] The creditor, having recovered a judgment for the debt against the principal debtor, assigned the same to a third party, together with certain property which had already been sold on the execution and bid in by the creditor, reserving, however, the right to enforce a judgment which he had also obtained against a surety for a part of the same debt. At the same time he gave to the principal a receipt, in which he agreed not to enforce against the latter any claims on the judgment or on the original debt. It was held that by this arrangement the creditor had in effect released the principal debtor from all further obligation to pay that part of the debt for which the surety was liable, and accordingly had exonerated the surety also.[3] A builder agreed to erect a building, for which he was to receive specified sums during the progress of the work, and the balance of the agreed price sixty days after the completion of the building, and gave a surety for the proper performance of his contract. The building having been completed, the owner, although he had received notice of various mechanics' liens, paid the builder the balance of the contract-price before it was due under the contract. He afterwards had to pay the amount of the liens, and sued the builder's surety therefor; but it was held that he had exonerated the surety by failing to retain the sums that fell due after he had received notice of the liens.[1] But the mere fact that an agent employed to sell machines on a commission is paid some of his commissions before they are due under his contract will not of itself release a surety upon a bond given by him for the faithful performance of his obligations.[2] A debtor gave to several banks to which he was indebted collateral security of two classes; the first class consisting of notes given for debts due to himself, and the second class consisting of notes made, indorsed, or guaranteed by a surety for his accommodation. By an indenture, to which the surety and the banks were parties, he then assigned all his property, including choses in action, to a trustee to pay the debts due to the banks. By the terms of the indenture, the banks were authorized to use their discretion in collecting the notes of the first class, and were to apply their proceeds, when collected, to the payment of his debts due to the banks. The banks were to hold the notes of the second class as collateral security, and not collect them, until the trustee should have disposed of the property assigned to him, and have distributed the proceeds among the banks. The banks, with the consent of the debtor and of the trustee, but not of the surety, made in good faith a compromise with several of the makers of the notes of the first class, so that a balance remained due to the banks, after the proceeds of the property assigned to the trustee had been paid to them, whereas, if these notes had been collected in full, the banks would have been fully paid. It was held that the banks had discharged the surety, to the extent of the sums given up by their compromise, from his liability on the notes of the second class.[1] The surrender of a leasehold estate by a tenant and its acceptance by the landlord were held to exonerate a third party from the burden of a mortgage which he had given to the landlord as security for the performance by the tenant of his covenants in the lease, on the ground that the term was a security to which he might have resorted for his indemnity, and which could not have been taken from the defendant without freeing him from his liability;[2] but the same rule would not be applied to a transfer of the lease made by the tenant to the lessor as collateral security merely for a debt, or to a surrender which, though made by the tenant, had not been actually accepted by the landlord.[3] And it has been held in New York that the surrender of a lease and the release of the rent thereafter to accrue will not discharge one who has guaranteed the payment of the rent reserved in a lease, from his liability for the rent which is overdue at the time of such surrender.[4] A creditor who held a mortgage from the principal debtor, and also a mortgage from the principal's wife as his surety, bought of the principal the premises mortgaged by him for a price exceeding the amount of his debt, but did not apply the price in payment of his debt; and it was held that he thereby discharged the mortgage which he had from the surety; for he had rendered unavailing the mortgage given by the prin-

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[1] Dalton *v.* Woburn Agricultural Association, 24 Pick. (Mass.) 257.

[2] Hereford *v.* Chase, 1 Rob. (La.) 212.

[3] Hubbell *v.* Carpenter, 5 Barb. (N. Y.) 520.

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[1] Taylor *v.* Jeter, 23 Mo. 244; Lucas County *v.* Roberts, 49 Iowa, 159. So in Fenaille *v.* Coudert, 44 N. J. Law, 286; Ryan *v.* Morton, 65 Tex. 258; Carson Opera House Association *v.* Miller, 16 Nevada, 327. *Antea*, § 123.

[2] Howe Machine Co. *v.* Woolley, 50 Iowa, 549.

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[1] American Bank *v.* Baker, 4 Met. (Mass.) 164.

[2] Haberton *v.* Bennett, 1 Beatty (Ir. Ch.), 386. See also Nichols *v.* Palmer, 48 Wisc. 110; Farrar *v.* Kramer, 5 Mo. App. 167.

[3] Breese *v.* Bange, 2 E. D. Smith (N. Y.), 474; McKensie *v.* Farrell, 4 Bosw. (N. Y.) 192.

[4] Kingsbury *v.* Westfall, 61 N. Y. 356.

surety, even though he has already recovered judgment against the latter.[1]

§ 126 *a*. **Surety on Bond not to be discharged by Release of Security caused by Act against which Bond taken.** — A surety on a guardian's bond cannot claim that he is discharged from liability by reason of his having given up security that he held, in reliance upon acts of the ward induced by the fraudulent actions of the guardian against which the bond was intended to be a security.[2] Where such a surety had taken a mortgage from the guardian as a protection against his liability, and then discharged this mortgage in reliance upon a receipt in full given by the ward after coming of age to the guardian, but it appeared that the guardian had fraudulently obtained this receipt from the ward, who was of feeble mind, by misrepresentations of its character, it was held that the ward could still hold the surety upon the bond; for the ward owed no duty to the surety, but the surety had undertaken for the fidelity and honesty of the guardian towards the ward,[3] and so could not avail himself of the receipt obtained from the ward by the mere fraud and circumvention of the guardian, even though by means of the same receipt the guardian had procured his discharge from the court to which he was accountable.[4] The surety on a bond given by a contractor to a city to pay laborers employed by the contractor on the city's work cannot complain that money earned upon the contract was paid according to its provision by the city to the contractor.[5]

§ 127. **Surety not entitled to Subrogation until the whole Debt is paid.** — The right of subrogation does not arise in favor of a surety until he has actually paid the debt for which he is liable as surety;[1] the right does not accrue upon a partial payment by the surety, until the creditor is wholly satisfied.[2] Even if a surety is liable only for a part of the debt, and pays that part for which he is liable, he cannot be subrogated to the securities held by the creditor until the whole demand of the creditor is satisfied.[3] Where the surety is allowed by bill in equity after the debt has become due to compel the creditor to enforce his demand against the principal debtor,[4] yet he cannot be subrogated to the creditor's liens, securities, and equities for the debt until he has actually paid it.[5] So, the indorser of a promissory note which is payable on time and secured by a mortgage of the principal's real estate, who has been compelled by the mortgagee to pay the interest which has become due thereon, cannot enforce the mortgage for his indemnity, while the note remains the property of another holder and the principal sum is still due thereon.[6] The payment need not be in one sum, but may be made at different times;[7] nor need it be wholly or at all in money, if the creditor accepts something else; though, as has been already stated, if it be not in money, the surety's right will extend only to his reimbursement for the real value of what he has paid.[1] It has been held in Missouri that a surety for part of the indebtedness of his principal becomes entitled, by paying the part for which he is liable, to a *pro rata* or proportionate share of the proceeds arising from a sale of the debtor's property, and may be subrogated accordingly to the rights of the other creditors, so as to have the benefit of all their securities;[2] but this is contrary to the general doctrine.[3] But if the effect of the surety's subrogation would be to give him a lien upon the property of the creditor himself, so that he would be entitled to immediate repayment from the creditor's property, then, to avoid circuity of action, the right may be enforced in the creditor's suit against the surety, without waiting for actual payment.[4]

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[1] Allison *v.* Thomas, 29 La. Ann. 732.

[2] Bank *v.* Buchanan, 87 Tenn. 32; Douglass *v.* Ferris, 63 Hun (N. Y.), 413.

[3] So in the case of a bank-cashier: McShane *v.* Howard Bank, 73 Md. 135.

[4] Gillett *v.* Wiley, 126 Ills. 310.

[5] Duluth *v.* Heney, 43 Minn. 155.

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[1] Ewart *v.* Latta, 4 McQu. H. L. 983; Church, Petitioner, 16 R. I. 231; Kemmerer's Appeal, 125 Penn. St. 283; Glass *v.* Pullen, 6 Bush (Ky.), 346; Pennsylvania Bank *v.* Potius, 10 Watts (Penn.), 148, 152; Conwell *v.* McCowan, 53 Ills. 363; Darst *v.* Bates, 51 Ills. 439; Gilliam *v.* Esselman, 5 Sneed (Tenn.), 86; McConnell *v.* Beattie, 34 Ark. 113; Rushforth, *ex parte*, 10 Ves. 409.

[2] Bridges *v.* Nicholson, 20 Ga. 90; Magee *v.* Leggett, 48 Miss. 139; Commonwealth *v.* Chesapeake & Ohio Canal Co., 32 Md. 501; Kyner *v.* Kyner, 6 Watts (Penn.), 221; Brough's Estate, 71 Penn. St. 460; Cox *v.* N. J. Midland R. R. Co., 31 N. J. Eq. 106; Barton *v.* Brent, 87 Va. 385; Stamford Bank *v.* Benedict, 15 Conn. 437; Field *v.* Hamilton, 45 Vt. 35; Vert *v.* Voss, 74 Ind. 566; Harlan *v.* Sweeny, 1 Lea (Tenn.), 682.

[3] Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. Dec. 334; s. c. *nom.* Swan *v.* Patterson, 7 Md. 164; Union Bank *v.* Edwards, 1 Gill & J. (Md.) 346; Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.), 270; Hopkinsville Bank *v.* Rudy, 2 Bush (Ky.), 326; Rice *v.* Morris, 82 Ind. 204; Cooper *v.* Jenkins, 32 Beav. 337; Farebrother *v.* Wodehouse, 23 Beav. 18.

[4] *Postea*, § 130

[5] Covey *v.* Neff, 63 Ind. 391; Rice *v.* Downing, 12 B. Mon. (Ky.) 44; Lee *v.* Griffin, 31 Miss. 632; Delaney *v.* Tipton, 3 Hayw. (Tenn.) 14.

[6] Gannett *v.* Blodgett, 39 N. H. 150.

[7] Davies *v.* Humphreys, 6 M. & W. 153; Bullock *v.* Campbell, 9 Gill (Md.), 182; Williams *v.* Williams, 5

§ 128. **Satisfaction is Creditor's Right; it need not come wholly from Surety.** — It is the creditor who is entitled to satisfaction; and neither the debtor nor any other creditors can object to any arrangement between the surety and the creditor for the subrogation of the surety, whether the latter has or has not completely satisfied the debt.[5] If the creditor accedes to the request of the surety for the enforcement of the collateral security, this will be ordered.[6] If the surety has satisfied the creditor partly by a set-off of the creditor's own obligations, or otherwise, and only partly in money, his right of subrogation will yet extend to the whole of the indebtedness which he has satisfied.[7] If the principal debtor has himself paid part of the indebtedness, and the surety only

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Ohio, 444; Hall *v.* Hall, 10 Humph. (Tenn.) 352; Pickett *v.* Bates, 3 La. Ann. 627.

[1] *Antea*, § 105.

[2] Allison *v.* Sutherlin, 50 Mo. 274.

[3] Child *v.* New York & New England R. R. Co., 129 Mass 170.

[4] State *v.* Atkins, 53 Ark. 303.

[5] Motley *v.* Harris, 1 Lea (Tenn.), 577; Spaulding *v.* Crane, 46 Vt. 292; Gedye *v.* Matson, 25 Beav. 310.

[6] Lusk *v.* Hopper, 3 Bush (Ky.), 179.

[7] Keokuk *v.* Love, 31 Iowa, 119; Bausman *v.* Credit Guarantee Co., 47 Minn. 378.

way avail themselves of such security in equity, without paying or offering to pay the whole of the debts for which the security was given.[1] So, where a debtor mortgaged two estates to a creditor as security for the payment of two distinct sums, with a surety for the payment of one of the sums only, the right of the creditor to retain both securities until the payment of both debts will override the right of the surety, upon his payment of the debt for which he is surety, to have the benefit of the security pledged for that debt.[2] And where the principal debtor gave to his creditor both a mortgage and a covenant by a surety to secure the payment of the debt, and then gave the creditor a further charge upon the mortgaged property to secure a further loan, it was held that the surety was not entitled to the benefit of the first mortgage without paying the second loan as well as the debt for which he was surety;[3] but this decision has since been overruled, on the ground that the creditor could not thus derogate from the rights of the surety,[4] being aware of the facts which create those rights.[5] As the doctrine of subrogation is founded upon reason and justice, and not upon any contract or stipulation between the parties, it follows as a necessary consequence that the surety is not to be substituted to the place of the creditor, unless upon the circumstances of the case it is shown to be just and proper that he should be. To become entitled to such substitution he must first pay the whole of the debt or debts for which the property is held by the creditor; for it would be manifestly unjust, and a plain violation of the creditor's rights, to compel him to relinquish any portion of the property before the obligation for the performance of which it had been conveyed to him has been fully complied with.[1] If a creditor, holding a claim for which he has both collateral security from the principal debtor and also the engagement of a surety, acquires an additional claim against the same principal, to which the agreement upon which the security was taken does not extend, the surety will be entitled to the benefit of such security on payment of the first indebtedness alone, and can require the proceeds of such security, when realized by the creditor, to be applied upon the first indebtedness; for the surety's right of subrogation, when once vested, cannot be interfered with by the act of the creditor alone.[2]

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[1] Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.), 270; Richardson *v.* Washington Bank, 3 Met. (Mass.) 536; Allen *v.* Culver, 3 Denio (N.Y.), 285; Stone *v.* Seymour, 15 Wend. (N. Y.) 19; Union Bank *v.* Edwards, 1 Gill & J. (Md.) 346; Noble *v* Murphy, 52 N. W. Rep. 148.

[2] Farebrother *v.* Wodehouse, 23 Beav. 18.

[3] Williams *v.* Owen, 13 Sim. 597.

[4] Forbes *v.* Jackson, 19 Ch. D. 616; Green *v.* Wynn, L. R. 4 Ch. 204.

[5] National Exchange Bank *v.* Silliman, 65 N. Y. 475; Ottawa Bank *v.* Dudgeon, 65 Ills. 11; Perry *v.* Miller, 54 Iowa, 277; Simmons *v.* Cates, 56 Ga. 609.

§ 130. **Surety may come into Equity to compel Payment of the Debt by the Principal.** — A surety, after the debt has become due, although he has not paid it, may, if the creditor refuses or neglects to enforce his demand against the principal debtor by proper legal proceedings, come into equity, bringing both the debtor and the creditor before the court, and have a decree compelling the debtor to make payment, and thus to exonerate the surety from liability;[3] and the creditor, being first fully indemnified, subjected to no delay, and exposed to no risk of loss, may, upon such a bill, be compelled to resort to the property of the principal for the satisfaction of his claim before coming upon the surety;[1] and the surety may have any property which has been specifically appropriated for the payment of the debt by or for the principal debtor applied thereto for his indemnity,[2] but this is strictly the right of the surety, and is not for the benefit of the principal.[3] So the surety may for his relief have the debt proved against the estate of the principal in bankruptcy.[4] But the surety cannot ask for the use of the securities and remedies held by the creditor to enforce payment from the principal, without indemnifying the creditor against any costs and expenses.[5] Nor has the surety any implied authority to sue the principal in the name of the creditor.[6] And when sureties who are claiming in a court of equity the benefit of subrogation have not yet paid the creditor, though a judgment has been recovered against them, it has been held that the court may, in the exercise of its equitable jurisdiction to declare future rights and duties, order that the sureties be subrogated to the rights of the creditor when they shall have paid the debt,[7] and may in the mean time protect the surety.[8]

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[1] *Merrick, J.*, in Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.), 270, 272, citing Richardson *v.* Washington Bank, 3 Met. (Mass.) 536; Copis *v.* Middleton, Turn. & Russ. 224; Hodgson *v.* Shaw, 3 Myl. & K. 183.

[2] National Exchange Bank *v.* Silliman, 65 N. Y. 475; Holliday *v.* Brown, 50 N. W. Rep. 1042; Forbes *v.* Jackson, 19 Ch. D. 616.

[3] Antrobus *v.* Davidson, 3 Meriv. 569, 579; Barbour *v.* Exchange Bank, 45 Ohio St. 133; Norton *v.* Reid, 11 So. Car. 593; Towe *v.* Newbold, 4 Jones Eq. (Nor. Car.) 212; Croone *v.* Bivens, 2 Head (Tenn.), 339; Washington *v.* Tait, 3 Humph. (Tenn.) 543; Howell *v.* Cobb, 2 Coldw. (Tenn.) 104; Gilliam *v.* Esselman, 5 Sneed (Tenn.), 86; Hannay *v.* Pell, 3 E. D. Smith (N. Y.), 432; Hayes *v.* Ward, 4 Johns. Ch. (N. Y.) 123; Irick *v.* Black, 17 N. J. Eq. 189; Pride *v.* Boyce, Rice Eq. (So. Car.) 275, 287; Tankersly *v.* Anderson, 4 Desaus. Eq. (So. Car.) 44; McConnell *v.* Scott, 15 Ohio, 401; Purviance *v.* Sutherland, 2 Ohio St. 478; Stump *v.* Rogers, 1 Hammond (Ohio), 533; Ritenour *v.* Matthews, 42 Ind. 7; Bishop *v.* Day, 13 Vt. 81; Wetzel *v.* Sponsler, 18 Penn. St. 460; Ruddell *v.* Childress, 31 Ark. 511; Stephenson *v.* Taveners, 9 Gratt. (Va.) 398; Whitridge *v.* Durkee, 2 Md. Ch. Dec. 442.

§ 130 *a*. **Equitable Relief given to the Surety**. — In equity, relief may also be given to a surety for his protection out of the property of his principal, so far as the surety's equitable rights can be maintained without injury to the creditor, either by granting an injunction against the sale of the

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[1] Thompson *v*. Taylor, 72 N. Y. 32; Hayes *v*. Ward, 4 Johns. Ch. (N. Y.) 123; Irick *v*. Black, 17 N. J. Eq. 189; Huey *v*. Pinney, 5 Minn. 310.

[2] Wooldridge *v*. Norris, L. R. 6 Eq. 410.

[3] White *v*. Schurer, 4 Baxter (Tenn.), 23.

[4] Babcock, *in re*, 3 Story C. C. 393; Wright *v*. Austin, 56 Barb. (N. Y.) 13, 17; Rushforth, *ex parte*, 10 Ves. 409.

[5] Beardsley *v*. Warner, 6 Wend. (N. Y.) 610.

[6] Hardware Co. *v*. Deere, 53 Ark. 140.

[7] Keokuk *v*. Love, 31 Iowa, 119; Moore *v*. Topliff, 107 Ills. 241.

[8] Moore *v*. Topliff, 107 Ills. 241, 249.

payment of the debt for which they are respectively liable."[1] A surety who first becomes such in an obligation incidental to the prosecution of a legal remedy against the principal, will, upon paying the debt, be allowed to stand in the creditor's place only as to his remedies against the person or property of the principal;[2] as to any prior surety, or any prior interest in property which may be pledged to the creditor for the debt, he must occupy the position of the debtor;[3] he cannot claim to be subrogated to the rights of the creditor against any prior sureties;[4] on the contrary, the prior surety, if compelled to pay the debt, will be subrogated against the subsequent surety.[5] Those who last become sureties do so, not only for the benefit of the creditor, but in exoneration of the former sureties, and will be liable to indemnify such former sureties.[6] Accordingly, if, after a judgment against two, one of whom appears by the record to be a surety only, a third party intervenes, solely at the request of the principal, and becomes bail for the stay of execution, taking indemnity from the principal therefor, and at the expiration of the stay the original surety is compelled to pay the judgment, he may, by subrogation thereto, recover the amount thereof from such bail.[7] One who becomes surety for the principal in the course of legal proceedings against him has no right of contribution against a prior surety for the debt;[1] but, on the contrary, the latter is entitled to be subrogated to the creditor's rights against him as in the case of bail.[2] The rights of a surety on a second appeal must yield to those of a surety on the first appeal of the same case, both being sureties for the same principal.[3] And one who, by becoming a surety on a judgment-bond, has prevented a sale of the debtor's property will not be substituted to the lien of the creditor, so as to overreach a junior lien created before the surety became liable;[4] nor can such a subsequent surety, after having paid the judgment, claim by subrogation the benefit of a mortgage given by the principal debtor to the original surety for the latter's indemnity.[5] But after the subsequent sureties who are primarily liable have been held for the full amount for which they became bound, the earlier sureties will be liable on their obligation for any deficiency; their right is merely to be preferred to the subsequent sureties.[6]

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[1] Bigelow, C. J., in Stout *v.* Fenno, 6 Allen (Mass.), 579, 580; Adams *v.* Flanagan, 36 Vt. 400; Schur *v.* Schwartz, 140 Penn. St. 53; Tracy *v.* Pomeroy, 120 Penn. St. 14; Semmes *v.* Naylor, 12 Gill & J. (Md.) 358; Dillon *v.* Scofield, 11 Neb. 419.

[2] Riemer *v.* Schlitz, 49 Wisc. 273; Burgett *v.* Patton, 99 Ills. 288, 302.

[3] Armstrong's Appeal, 5 Watts & Serg. (Penn.) 352; Hopkinsville Bank *v.* Rudy, 2 Bush (Ky.), 326; Crow *v.* Murphy, 12 B. Mon. (Ky.) 444; Bohannon *v.* Coombs, 12 B. Mon. (Ky.) 563; Patterson *v.* Pope, 5 Dana (Ky.), 241; Yoder *v.* Briggs, 3 Bibb (Ky.), 228.

[4] Hammock *v.* Baker, 3 Bush (Ky.), 208; Smith *v.* Bing, 3 Ohio, 33; Fitzpatrick *v.* Hill, 9 Ala. 783.

[5] Kellar *v.* Williams, 10 Bush (Ky.), 216; Friberg *v.* Donovan, 23 Ills. App. 58.

[6] Chrisman *v.* Jones, 34 Ark. 73; Bently *v.* Harris, 2 Gratt. (Va.) 357; Higgs *v.* Landrum, 1 Coldw. (Tenn.) 81.

[7] Schnitzel's Appeal, 49 Penn. St. 23; Burns *v.* Huntingdon Bank, 1 Pen. & W. (Penn.) 395; Pott *v.* Nathans, 1 Watts & Serg. (Penn.) 155; Winchester *v.* Beardin, 10 Humph. (Tenn.) 247; Hanner *v.* Douglass, 4 Jones Eq. (Nor. Car.) 262.

§ 132. **Rights of one who becomes Surety for the Payment of a Judgment.** — Where the payee of a promissory note commenced a suit against the three makers thereof, and pending the suit made an agreement with A., one of these makers, by which A. was to pay a certain sum upon the note, and the creditor should take judgment for the balance against the three, but should not enforce his judgment against A., and A. made the payment accordingly, and the creditor subsequently collected his judgment from the bail of another of the defendants, and in pursuance of an order of the county court the bail took an assignment of the judgment from the creditor, and subsequently collected the amount of this judgment from A.,[1] it was held that the creditor was not responsible for this act of the bail after the assignment of the judgment had been made by order of the court, and that A could not maintain an action against the creditor upon the agreement not to enforce payment from him; and *Redfield*, *J.*, said that the county court had no power to order such subrogation of the bail to the rights of the creditor, and that at most the bail by such subrogation could acquire only those rights which the creditor had, and must take the judgment subject to the creditor's agreement not to enforce collection thereof against A., though A.'s only remedy to enforce compliance by the bail with this agreement would be in equity.[2] Where the original principal in the debt prosecuted a writ of error, which was overruled, and the surety or indorser of the note afterwards paid the debt, he was subrogated to the judgment rendered on the writ of error against the orginal defendants and the sureties on the *supersedeas* bond, upon the general principle that the surety is entitled to all collaterals, and that the second sureties may, by becoming such, have put him in a worse condition; and the court said that the latter sureties, having, at the instance of the principal, stipulated to pay the debt, suffered no injustice in being called upon to do so, since they were obliged to do no more than they undertook, and had no right to complain that they were not allowed to use as a payment by themselves the money which proceeded from another person, whom their principal was previously bound to save harmless. If the interposition of the second sureties may have been the means of involving the first surety in the necessity of paying

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[1] Daniel *v.* Joyner, 3 Ired. Eq. (Nor. Car.) 513; Dent *v.* Wait, 9 W. Va. 41; Hammock *v.* Baker, 3 Bush (Ky.), 208.

[2] Bender *v.* George, 92 Penn. St. 36; Hanby *v.* Henritze, 85 Va. 177; Denier *v.* Myers, 20 Ohio St. 336; Chaffin *v.* Campbell, 4 Sneed (Tenn.), 184; Brandenburg *v.* Flynn, 12 B. Mon. (Ky.), 397.

[3] Hinckley *v.* Kreitz, 58 N. Y. 583; Moore *v.* Larriter, 16 Lea (Tenn.), 630.

[4] Fishback *v.* Bodman, 14 Bush (Ky.), 117.

[5] Havens *v.* Foudry, 4 Met. (Ky.) 247.

[6] Chester *v.* Broderick, 131 N. Y. 549; s. c., 60 Hun (N. Y.), 562.

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[1] See Pierson *v.* Catlin, 3 Vt. 272.

[2] Pierson *v.* Catlin, 18 Vt. 77.

appeal against them and their surety on the appeal, and on further appeal is again affirmed against the three and their surety on the second appeal, the first and second surety are related to each other, not as co-sureties, but as principal and surety; and if the first surety pays the final judgment he has no recourse against the second.[1] And if a judgment against a principal debtor and his sureties is superseded by the defendants with two others as their sureties, all the defendants in the original judgment are principals as to the sureties in the *supersedeas* judgment.[2]

§ 134. **Exceptions to Usual Rule of Subrogation between Successive Sureties.** — In Louisiana it has been held, contrary to the general rule, that the second surety is entitled to subrogation against the first surety, on the presumption that the second surety was induced to bind himself in consequence of the responsibility of the principal having been guaranteed by the first surety; and accordingly the surety in an appeal-bond, after paying the amount of a judgment against his principal, was allowed to enforce the judgment against the original bail in the suit for the whole amount so paid by him.[3] A like decision was rendered, under special circumstances, in Missouri.[4] In Virginia a surety who becomes such in the course of judicial proceedings for the collection of the debt from the principal is subrogated like any other surety for the debt to all the remedies of the creditor, even against third persons, whose rights, though subject to the creditor's lien, have accrued before the obligation of the surety was entered into; he will be subrogated to the creditor's judgment-lien upon lands alienated by the debtor

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342; Harrison *v.* Lane, 5 Leigh (Va.), 414; Adams *v.* Flanagan, 36 Vt. 400; Harris *v.* Warner, 13 Wend. (N. Y.) 400.

[1] Cowan *v.* Duncan, Meigs (Tenn.), 470.

[2] Yeager's Appeal, 8 Atl. Rep. 225; Smith *v.* Anderson, 18 Md. 520; Hartwell *v.* Smith, 15 Ohio St. 200; Bradford *v.* Mooney, 2 Cincin. (Ohio) 468. See Monson *v.* Drakeley, 40 Conn. 552.

[3] Howe *v.* Frazer, 2 Rob. (La.) 424.

[4] State *v.* Farrar, 77 Mo. 175.

after the judgment, but before the surety became such.[1] Where, on an appeal from a judgment, a new judgment was rendered for a much larger sum, and was paid by the surety in the appeal-bond, this surety was subrogated to the creditor's judgment-lien against mesne purchasers of the debtor's real estate, not only for the amount of the original judgment, but also for the increased amount which the surety had been compelled to pay,[2] and the original surety cannot have contribution from sureties given in the course of subsequent litigation.[3] But a judgment-surety for the principal debtor will not be subrogated to the creditor's lien upon the property of one who stands in the position of a prior surety for the judgment-debtor.[4] In Maine and Massachusetts it has been held that the doctrine of subrogation is not applied at all as between successive sureties taken in the course of judicial proceedings against the principal debtor; and neither the prior nor the subsequent surety is allowed any remedy at law against the other.[5] And in Maryland the principles of contribution between co-sureties are not to be applied to such successive sureties.[6]

§ 135. **Whether Original Obligation extinguished by Surety's Payment thereof; Rule in England.**—Although it is a general rule that in equity a surety is subrogated to the benefit of all the securities for the debt which the creditor holds against the principal, yet it was finally settled in England that this subrogation must be limited to such securities only as continue to exist and are not *ipso facto* extinguished by the act of payment,[7] and that payment of a bond or other specialty or of a judgment executed by or recovered against both principal and surety, or the principal alone, extinguished the obligation, so as to prevent any subrogation of the surety thereto.[1] But the technical reasoning of these decisions, never entirely satisfactory, has now been done away with in England by a statutory provision that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him every judgment, specialty, or other security, which shall be held by the creditor in respect of such debt or duty, whether such specialty, judgment, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or from any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the loss sustained and advances made by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him; provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between the parties themselves, such last-mentioned parties shall be justly liable."[2] This statute will be applied to protect a co-surety or co-debtor from whom the creditor has

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[1] Hill *v.* Manser, 11 Gratt. (Va.) 522; Rodgers *v.* McCluer, 4 Gratt. (Va.) 81; Leake *v.* Ferguson, 2 Gratt. (Va.) 419.

[2] McLung *v.* Beirne, 10 Leigh (Va.), 394.

[3] Rosenbaum *v.* Goodman, 78 Va. 121.

[4] Douglass *v.* Fagg, 8 Leigh (Va.), 588.

[5] Holmes *v.* Day, 108 Mass. 563; Morse *v.* Williams, 22 Maine, 17.

[6] Semmes *v.* Naylor, 12 Gill & J. (Md.) 358.

[7] Copis *v.* Middleton, Turn. & Russ. 224.

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[1] Jones *v.* Davids, 4 Russ. 277; Copis *v.* Middleton, Turn. & Russ. 224; Armitage *v.* Baldwin, 5 Beav. 278; Dowbiggen *v.* Bourne, 2 Yo. & Co. Exch. 462; Hodgson *v.* Shaw, 3 Mylne & K. 183.

[2] Mercantile Law Amendment Act, 19 & 20 Vic., c. 97, § 5.

surety to reimburse himself out of a mortgage-lien held by the creditor, and permitting him to take out of the estate generally of the debtor the amount that he has paid? If he realizes upon the mortgage, he abstracts the amount which he has paid from the estate of the principal; if he realizes on the bond, the mortgaged property goes back into the common fund, and the result to him and the other creditors is the same. The very fact that the surety could not enforce the bond at law is a reason in equity why he should be allowed to come into the distribution as a bond-creditor."[1] But the recovery of a judgment in one State upon a judgment previously recovered in another State or in another court has been held so far to extinguish the first judgment that a surety cannot, upon paying the later, be subrogated to the earlier judgment.[2]

§ 137. **Right of Surety to be substituted to the Benefit of the Original Obligation maintained.** — In the following States this right of the surety has been more or less distinctly affirmed.

In *New Hampshire*, it is held that though payment of a joint debt by either of the debtors is a discharge of the debt[3] and of any action, judgment, or execution, founded upon it,[4] yet, if the debt is paid by a surety, and the creditor upon his payment assigns to him any collateral security, the debt will be regarded as still subsisting and undischarged, so far as is necessary to protect the security. And an attachment of the property of the principal in an action pending for the recovery of the debt is such a collateral security; and accordingly the surety, after his payment, may take an assignment of such an action, prosecute it to judgment, and take out execution thereon for his own use.[5] And if a joint and several promissory note is taken up by one of the signers thereof who is merely a surety, not with the intention to pay and discharge it, but to purchase it, this will not be a discharge of the debt, and an action may still be maintained upon the note in the name of the payee for the benefit of the real plaintiff.[1]

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[1] *Nisbet, J.*, in Lumpkin *v.* Mills, 4 Ga. 343, 349.

[2] United States Bank *v.* Patton, 5 How. (Miss.) 200; Frazier *v.* McQueen, 20 Ark. 68; Whiting *v.* Beebe, 12 *Id.* 421, 549; Gould *v.* Hayden, 63 Ind. 443; Denegre *v.* Ham, 13 Iowa, 240; Hanna *v.* Guy, 3 Bush (Ky.), 91; Cook *v.* Armstrong, 25 Miss. 63; Purdy *v.* Doyle, 1 Paige (N. Y.), 558.

[3] Davis *v.* Stevens, 10 N. H. 186.

[4] Stanley *v.* Nutter, 16 N. H. 22.

[5] Brewer *v.* Franklin Mills, 42 N.

Nebraska. — The New Hampshire rule as to an attachment pending against the principal when payment is made by a surety has been followed in Nebraska.[2] The surety may, upon proving his suretyship in the original action, but not otherwise, have a judgment against his principal and himself assigned to himself on his payment, and enforce it against the principal for his own indemnity.[3]

In *New York*, a surety upon the performance of his contract is entitled to the original evidences of indebtedness held by the creditor, and to any judgment in which the debt has been merged; the surety has not only a right of subrogation pure and simple, but may also demand an assignment from the creditor; and though the obligation is discharged so far as the creditor has any interest therein, yet the original debt is kept alive for the benefit of the surety, against the principal debtor.[4] A surety paying a judgment against himself and his principal has the right to have it assigned to himself, and may then enforce it against the principal or his estate.[5] This rule, originally restricted to equity,[6] is now applied also at law.[7]

H. 292; Edgerly *v.* Emerson, 23 N. H. 555; Low *v.* Blodgett, 21 N. H. 121.

[1] Rockingham Bank *v.* Claggett, 29 N. H. 292.

[2] Wilson *v.* Burney, 8 Nebraska, 39.

[3] Potvin *v.* Myers, 27 Neb. 749.

[4] Townsend *v.* Whitney, 75 N. Y. 425; Fielding *v.* Waterhouse, 8 Jones & Spencer (N. Y.), 424; Cuyler *v.* Ensworth, 6 Paige (N. Y.), 32; Clason *v.* Morris, 10 Johns. (N. Y.) 524.

[5] Goodyear *v.* Watson, 14 Barb. (N. Y.) 481; Townsend *v.* Whitney, 15 Hun (N. Y.), 93; s. c. 75 N. Y. 425; Waller *v.* Harris, 7 Paige (N. Y.), 167.

[6] Ontario Bank *v.* Walker, 1 Hill (N. Y.), 652, and reporter's note citing New York Bank *v.* Fletcher, 5 Wend. (N. Y.) 85, 89.

[7] Alden *v.* Clark, 11 How. Pr. (N.

In *Pennsylvania*, a surety who has paid a debt secured by a judgment against his principal, and who is in other respects entitled to subrogation, may revive the judgment without first obtaining a decree of substitution, and may have his rights tried on a *scire facias*,[1] even though an entry of satisfaction has been made upon the judgment, if this was not done at the instance of the surety.[2] Actual payment discharges a judgment or other incumbrance at law, but, where justice requires it, it is still kept on foot for the protection of the surety who has paid it.[3] He will be subrogated to all the creditor's rights in the original obligation which he has paid,[4] not only against his principal for indemnity, but against his co-sureties for contribution,[5] and not only to the benefit of a direct obligation, such as a judgment or pending action, but of such an incidental remedy as a distress for rent.[6] The surety will need no formal assignment.[7]

In *New Jersey*, a co-defendant who has been compelled to pay a judgment upon which the other defendant was primarily liable may have the benefit and control of the judgment and execution for his reimbursement against his co-defendant, the primary debtor. The rights of the parties are settled by statute.[8]

In *Delaware*, the surety upon a bond may, on tender of the debt, demand an assignment of the bond, that he may

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Y.) 209; Dunford *v.* Weaver, 84 N. Y. 445.

[1] Cottrell's Appeal, 23 Penn. St. 294; Richter *v.* Cummings, 60 Penn. St. 441; Cochran *v.* Shields, 2 Grant (Penn. Cas.), 437.

[2] Baily *v.* Brownfield, 20 Penn. St. 41.

[3] *Woodward. J.*, in Cottrell's Appeal, 23 Penn. St. 294, 295; Fleming *v.* Beaver, 2 Rawle (Penn.), 128; Himes *v.* Keller, 3 W. & S. 401; Erb's Appeal, 2 Pen. & W. 296.

[4] Wright *v.* Grover & Baker S. M. Co., 82 Penn. St. 80; Brown *v.* Black, 96 Penn. St. 482; Bank *v.* Harper, 8 Penn. St. 249.

[5] Springer *v.* Springer, 43 Penn. St. 518.

[6] King *v.* Blackmore, 72 Penn. St. 347, distinguishing Quinn *v.* Wallace, 6 Wheat. 452.

[7] Duffield *v.* Cooper, 87 Penn. St. 443.

[8] Durand *v.* Trusdell, 44 N. J. L. 597; White *v.* Brown, 29 *Id.* 307.

already lost;[1] and the same rule is applied to specialties or other obligations.[2] Nor will the surety lose this right by having taken other security from his principal.[3]

In *North Carolina* a surety who pays a judgment for the debt recovered against his principal may have the judgment assigned to a trustee for his reimbursement, and may pursue the bail of his principal,[4] even though a receipt be given by the creditor to the principal.[5] But the surety, to protect his rights, must take such an assignment; if he does not, the debt will be extinguished, both as to his principal and himself.[6] And the assignment must not be made to himself, but to one who was not a party to the record.[7] Such an assignment will preserve the original obligation, and enable the surety to enforce all the remedies which the creditor might have used against the principal;[8] and the surety may control the judgment even against the nominal assignee.[9] The surety upon a specialty debt, who has paid it, will be deemed a specialty creditor, both of his principal and of his co-sureties.[10] But the surety's right, if contested, can be enforced only in an independent action.[11] A mere joint debtor has not the same equity of subrogation against his associates that a surety enjoys against his principal.[12]

Kinney, 3 Leigh (Va.), 272; Rodgers *v.* McCluer, 4 Gratt. (Va.) 81; McLung *v.* Beirne, 10 Leigh (Va.), 394.

[1] Carr *v.* Glasscock, 3 Gratt. (Va.) 343.

[2] Lidderdale *v.* Robinson, 12 Wheaton, 594; Tinsley *v.* Oliver, 5 Munf. (Va.) 419; Powell *v.* White, 11 Leigh (Va.), 309; Eppes *v.* Randolph, 2 Call (Va.), 125.

[3] Miller *v.* Pendleton, 4 Hen. & Munf. (Va.) 436.

[4] Hanner *v.* Douglass, 4 Jones. Eq. (Nor. Car.) 262.

[5] Newbern *v.* Dawson, 10 Ired. Law (Nor. Car.), 436.

[6] Bledsoe *v.* Nixon, 68 Nor. Car. 521; Sherwood *v.* Collier, 3 Dev. Law (Nor. Car.), 380.

[7] Briley *v.* Sugg, 1 Dev. & Bat. Eq. (Nor. Car.) 366.

[8] Hodges *v.* Armstrong, 3 Dev. Law (Nor. Car.), 253; Brown *v.* Long, 1 Ired. Eq. (Nor. Car.) 190.

[9] Rice *v.* Hearn, 109 Nor. Car. 150.

[10] Howell *v.* Reams, 73 Nor. Car. 391; Drake *v.* Coltrane, 1 Busbee (Nor. Car.), 300; Stat. Nor. Car. 1828, c. 110, § 4.

[11] Calvert *v.* Peebles, 82 Nor. Car. 334.

[12] Jones *v.* McKinnon, 87 Nor. Car. 294; Towe *v.* Felton, 7 Jones Law, 216.

In *South Carolina*, a surety who pays a judgment recovered against himself and his principal, or a specialty executed by himself and his principal, does not thereby extinguish it, but may in equity enforce it against his principal's estate,[1] though this privilege has been denied as between co-sureties.[2] But the lien of a judgment which has been paid by one surety has been kept alive for his protection against the insolvent estate of his co-surety.[3] Where after separate judgments against principal and surety for the same debt, the latter paid the judgment against himself, and thereupon the sheriff entered satisfaction upon both judgments, the surety was allowed to vacate this entry upon the judgment against the principal, and to set it up as a lien upon his estate.[4] The same right of subrogation has been allowed to a son who, at the request of his father, has paid a judgment against the latter.[5]

In *Georgia*, a surety who has paid the debt of his principal is, in equity, subrogated to all the remedies of the creditor, and is entitled to occupy the place of and be substituted for the creditor upon the original evidence of the debt;[6] and the surety upon his payment of the debt may require an assignment thereof from the creditor.[7] If a surety pays a judgment rendered against himself and his principal, he is entitled to control such judgment and the execution thereon,[8] and this right will pass upon his decease to his personal representatives.[1] But this right is in equity, not at law;[2] and where, pending a suit brought jointly against the maker and the indorser of a promissory note, the indorser paid the note, it was held that this payment, made before judgment, barred the further prosecution of the suit, even at the instance and for the benefit of the indorser; his remedy was by action in his own name.[3] And this right of subrogation to the original indebtedness is allowed only to a surety; it will not be extended to a mere joint debtor.[4] This right of subrogation is affirmed and regulated by statute.[5]

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[1] Garvin *v.* Garvin, 27 So. Car. 472; Kinard *v.* Baird, 20 So. Car. 377; Thompson *v.* Palmer, 3 Rich. Eq. (So. Car.) 139; King *v.* Aughtrey, 3 Strobh. Eq. (So. Car.) 149; Ware, *ex parte*, 5 Rich. Eq. (So. Car.) 473; Smith *v.* Swain, 7 Rich. Eq. (So. Car.) 112; Schultz *v.* Carter, Speers Eq. (So. Car.) 534; Le Noir *v.* Winn, 4 Desaus. 65.

[2] So. Car. Bank *v.* Adger, 2 Hill Eq. (So. Car.) 262; Cunningham *v.* Smith, Harp. Eq. (So. Car.) 90.

[3] Burrows *v.* McWhann, 1 Desaus. Eq. (So. Car.) 409.

[4] Perkins *v.* Kershaw, 1 Hill, Eq. (So. Car.) 344.

[5] Sutton *v.* Sutton, 26 So. Car. 33.

[6] Lumpkin *v.* Mills, 4 Ga. 343.

[7] McDougald *v.* Dougherty, 14 Ga. 674.

[8] Burke *v.* Lee, 59 Ga. 165; Davenport *v.* Hardeman, 5 Ga. 580.

In *Ohio*, a surety who pays a judgment rendered against himself and his principal will be subrogated to the rights therein of the creditor;[6] this payment will not operate as an extinguishment of the judgment for the benefit of the principal.[7] If one of several co-sureties pays a judgment against them, with the intention of saving his right to be subrogated to the remedies of the judgment-creditor, he may afterwards be subrogated to the judgment, notwithstanding its legal extinction; and such intention on his part will be presumed from the bare fact of payment until the contrary is shown.[8] The remedy against the co-surety is limited to six years, like a simple contract;[9] that against the principal is extended to ten years.[10]

In *Kentucky*, a surety advancing to the creditor the amount of a judgment against his principal may stipulate for substitution and the control of the judgment and execution against his principal for his reimbursement; and a court of law will protect him therein.[11] And under the statutes a surety, upon

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[1] Harris *v.* Wynne, 4 Ga. 521.

[2] Knight *v.* Morrison, 79 Ga. 55; Elam *v.* Rawson, 21 Ga. 139.

[3] Griffin *v.* Hampton, 21 Ga. 198.

[4] Adams *v.* Keeler, 30 Ga. 86.

[5] Code, §§ 2167, 2171. Thomason *v.* Wade, 72 Ga. 160.

[6] Ohio Civil Code, § 449. Peters *v.* McWilliams, 36 Ohio St. 155.

[7] Neal *v.* Nash, 23 Ohio St. 483; Dempsey *v.* Bush, 18 Ohio St. 376.

[8] Neilson *v.* Fry, 16 Ohio St. 552.

[9] Neilson *v.* Fry, *supra*.

[10] Neal *v.* Nash, 23 Ohio St. 483.

[11] Morris *v.* Evans, 2 B. Mon. (Ky.) 84; Roberts *v.* Bruce, 15 So. W. Rep. 872.

In *Mississippi*, under the former statutes, a surety who had paid a judgment for his principal was in equity entitled to be subrogated to all the rights of the creditor in the judgment; but at law his payment extinguished the judgment, and he became merely a simple-contract creditor of the principal.[1] The present statute[2] protects the rights of the surety at law;[3] and he is subrogated to the judgment-lien, and to all the rights of the judgment-creditor, and may take out execution upon the original judgment. This subrogation takes place by operation of law upon the surety's payment, without any entry upon the judgment-roll or elsewhere. Nor will the surety's judgment-lien upon the lands of the principal debtor, even in the hands of *bona fide* purchasers thereof, be affected by the fact that upon his payment the judgment was marked settled by the plaintiff's attorney upon the judgment-roll and execution-docket, if the entry was made without the surety's authority or consent.[4]

In *Alabama*, though it was first held that an execution against the principal might be enforced for the benefit of a surety who had paid the judgment,[5] it was afterwards considered that the surety could not after his payment keep the judgment alive against either his principal or his co-sureties;[6] that even though he took an assignment of the judgment he would have no remedy at law except as a simple-contract creditor of the principal;[7] that he could assert no lien by virtue of the instrument upon which he had been surety, as that became *functus officio* by payment of the debt which it secured.[8] But it is now provided by statute[9] that the surety upon paying such a judgment may have it assigned to himself, and may enforce it for his indemnity, against the principal debtor, at law or in equity, as fully as the creditor himself might have done.[1]

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[1] Dinkins *v.* Bailey, 23 Miss. 284; Conway *v.* Strong, 24 Miss. 665.

[2] Code, 1871, § 2258.

[3] Swan *v.* Smith, 57 Miss. 548.

[4] Yates *v.* Mead, 68 Miss. 787.

[5] Clemens *v.* Prout, 3 Stew. & P. 345.

[6] Morrison *v.* Marvin, 6 Ala. 797; Preslar *v.* Stallworth, 37 Ala. 402.

[7] Sanders *v.* Watson, 14 Ala. 198; Smith *v.* Harrison, 33 Ala. 706.

[8] Foster *v.* Athenæum, 3 Ala. 302.

[9] Alabama Civil Code, § 3157.

In *Michigan*, the payment of a judgment by a surety with the intent to avail himself, by subrogation, of the lien of the judgment, will not in equity extinguish the debt or destroy the force of a levy upon the execution. Equity will enforce the right of subrogation by keeping the debt alive and preserving the force of the levy for the protection of the surety.[2]

In *Iowa*, the surety on his payment is in equity subrogated to the rights of the creditor in the original obligation,[3] and may enforce the same as of the class to which it originally belonged;[4] but at law his payment of a judgment extinguishes it,[5] and his right of subrogation is not available until enforced by proper legal proceedings seasonably brought.[6] He may take an assignment of the original obligation, and then enforce the creditor's right.[7]

In *Indiana*, though the surety may enforce all the rights of the creditor in the original obligation by having it properly assigned to himself,[8] yet, when a judgment is rendered jointly against two, they are both to be regarded as principals, until one of them is shown to be a surety for the other;[9] and when one of such defendants, claiming to be merely a surety, but without any judicial determination as to his suretyship, pays the judgment, he cannot have execution thereon for his own use.[10] The surety should establish his right by proper proceedings in the original suit or by subsequent proceedings;[11]

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[1] Bragg *v.* Patterson, 85 Ala. 233; Blackman *v.* Joiner, 81 Ala. 344; Vanderveer *v.* Ware, 65 Ala. 606.

[2] Smith *v.* Rumsey, 33 Mich. 183.

[3] Hollingsworth *v.* Pearson, 53 Iowa, 53.

[4] Searing *v.* Berry, 58 Iowa, 20; Braught *v.* Griffith, 16 Iowa, 26.

[5] Drefahl *v.* Tuttle, 42 Iowa, 177; Bones *v.* Aiken, 35 Iowa, 534.

[6] Johnston *v.* Belden, 49 Iowa, 301.

[7] Schleissman *v.* Kallenberg, 72 Iowa, 338.

[8] Manford *v.* Firth, 68 Ind. 83.

[9] Klippel *v.* Shields, 90 Ind. 81. So in the case of bail. Kane *v.* State, 78 Ind. 103.

[10] Laval *v.* Rowley, 17 Ind. 36; Evans *v.* Moore, 84 Ind. 440.

[11] Scherer *v.* Schutz, 83 Ind. 543.

then he may be subrogated to the creditor's rights, after paying the debt.[1]

In *Wisconsin*, a surety upon paying a judgment against himself, his principal, and his co-sureties, may be subrogated to the creditor's rights therein, — against the principal, for the full amount of the debt, and against the sureties for their proportions thereof.[2] The judgment-lien may be kept alive against the other judgment-debtors, either for reimbursement or for contribution.[3]

In *Minnesota*, a surety who has paid a judgment against his principal and himself may not only maintain an action at law against his principal in his own name, but may also enforce the creditor's original judgment-lien against the principal debtor.[4]

In *Kansas*, by statute, sureties who have paid a judgment rendered against their principals and themselves may take an assignment from the judgment-creditor, and enforce the execution against their principals.[5]

In *Illinois*, the surety, upon paying a judgment against his principal, may take an assignment of it, and have it kept alive for his benefit,[6] and may enforce all the securities held by the judgment-creditor.[7] He has an election to keep the judgment alive against his principal, or to treat it as extinguished and sue his principal for reimbursement.[8] If he takes an assignment to a third person he must, before enforcing execution against a co-defendant, procure and file an assignment to himself.[9]

In *Missouri*, a surety who pays the debt of his principal is entitled to an assignment of the instrument paid. Though

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[1] Johnson *v.* Amano Lodge, 92 Ind. 150.

[2] German American Savings Bank *v.* Fritz, 68 Wisc. 390.

[3] Mason *v.* Pierron, 69 Wisc. 585. Wisc. Rev. Stats., § 3021.

[4] Kimmel *v.* Lowe, 28 Minn. 265.

[5] Harris *v.* Frank, 29 Kans. 200.

[6] Allen *v.* Powell, 108 Ills. 584.

[7] Rice *v.* Rice, 108 Ills. 199.

[8] Katz *v.* Moessinger, 110 Ills. 372; Chandler *v.* Higgins, 109 Ills. 602.

[9] Farwell *v.* Becker, 129 Ills. 261.

pays a judgment recovered against the principal debtor is thereby subrogated to the rights of the creditor, and may issue an execution on the judgment in the name of the creditor for the recovery of the amount which as surety he has paid;[1] and since the surety has an equitable interest in the payment of the demand by the principal, the creditor may permit an execution to issue at the instance of the surety.[2]

In *California*, one of two co-defendants paying the whole of a judgment against them is entitled to be subrogated to the rights of the plaintiff in the judgment to the extent to which his payment accrues to the benefit of his co-defendant;[3] but this right does not arise until he has fully satisfied the judgment.[4] An assignment, however, though made before maturity, of a joint and several promissory note to one of its makers from the payee thereof, constitutes a payment and discharge of the obligation.[5]

§ 138. **Right of the Surety to be subrogated to the Benefit of the Original Obligation denied.** — On the other hand, it has been maintained in some jurisdictions that, although the surety is entitled, upon his payment of the debt, to take by subrogation all the securities which the creditor held for the debt, this does not mean that the original obligation, which is discharged by the payment, shall be assigned to or vested in the surety, but refers only to such securities as are collateral to the principal obligation.[6] A judgment against principal and surety is taken to merge that relation between the debtors,[7] and cannot, after a payment by the surety, be kept alive against the principal, for the benefit of the surety.[8] This rule is followed in

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[1] Connely *v.* Bourg, 16 La. Ann. 108; Tardy *v.* Allen, 3 La. Ann. 66.

[2] Fluker *v.* Bobo, 11 La. Ann. 609.

[3] Coffee *v.* Tevis, 17 Calif. 239.

[4] McDermott *v.* Mitchell, 53 Calif. 616.

[5] Gordan *v.* Wansey, 21 Calif. 77.

[6] Dennis *v.* Rider, 2 McLean, C. C. 451; United States *v.* Preston, 4 Wash. C. C. 446.

[7] Findlay *v.* United States Bank, 2 McLean, C. C. 44.

[8] McLean *v.* Lafayette Bank, 3 McLean, C. C. 587.

Vermont, where it is held that when a debt is paid, though by a surety, all liens and securities taken or obtained in legal proceedings to enforce its collection are also extinguished.[1] The original obligation is extinguished as to all the debtors by one debtor's payment thereof.[2]

In *Massachusetts*, a debtor, whether principal or surety, who pays a debt for which others are bound with him, thereby extinguishes its obligation, and can obtain indemnity or contribution from the other debtors only by an independent action against them.[3] The original debt is extinguished, and no further action can be maintained upon it, though the transaction be in form a purchase and an assignment be made of the debt.[4]

In *Maine*, the same rule prevails as that adopted in Massachusetts.[5]

In *Nevada*, a surety who has paid a note and had it assigned to himself, though he may maintain an action against the principal debtor for his payment, has no remedy upon the note itself.[6]

But the rule generally adopted, except in these States, is that a payment by a surety does not necessarily in equity extinguish the original obligation, as between the surety and his principal, but only so far as the rights of the creditor are concerned.[7]

§ 139. **Indemnity held by a Surety discharged by his Release from Liability.** — A mortgage given to the surety for his indemnity by the principal debtor is extinguished by the surety's discharge from liability.[1] If the original debt is paid, and the surety accordingly discharged, by the execution of a new note with a new surety, such a mortgage is extinguished;[2] and it cannot be kept alive by an assignment thereof to the new surety;[3] though a contemporaneous verbal agreement between the mortgagor, the mortgagee, and the new surety that a mortgage of personal property should stand as security to the new surety, might of itself, as between the parties, constitute a valid mortgage of the property.[4] If a surety who holds such a security becomes indebted to his principal upon a different transaction, and in consideration thereof assumes the payment of the debt for which he was a surety, this arrangement will release the security in his hands.[5] But a mortgage given to a surety for his indemnity was allowed to pass to a third person who paid the money for the surety on the faith of an agreement that the mortgage should be assigned to him.[6] And if the note which constituted the original indebtedness is, after protest for non-payment, paid out of the proceeds of a new note made by the mortgagor and indorsed by the mortgagee for that express purpose, the mortgage will not thereby be discharged, but will continue in force as a protection to the mortgagee against his liability upon the second note.[7] The mere change in the form of the debt does not discharge the security.[8]

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[1] Moore *v.* Campbell, 36 Vt. 361.

[2] Dana *v.* Conant, 30 Vt. 246; Allen *v.* Ogden, 12 Vt. 9; Porter *v.* Gile, 44 Vt. 520.

[3] Adams *v.* Drake, 11 Cush. (Mass.) 504; Brackett *v.* Winslow, 17 Mass. 153; Hammatt *v.* Wyman, 9 Mass. 138.

[4] Slade *v.* Mutrie, 156 Mass. 19; New Bedford Savings Institution *v.* Hathaway, 134 Mass. 69; Gardner *v.* Way, 5 Allen, 452; Chapman *v.* Collins, 12 Cush. 163; Bryant *v.* Smith, 10 Cush. 169; Pray *v.* Maine, 7 Cush. 253.

[5] Whittier *v.* Heminway, 22 Me. 238; Morse *v.* Williams, 22 Maine 17.

[6] Frevert *v.* Henry, 14 Nev. 191.

[7] *Antea*, §§ 135, 136, 137.

§ 140. **Right of Subrogation among Co-sureties.** — One of two or more co-sureties who has paid the debt to their common creditor may be subrogated to the rights of that creditor against his co-sureties, to enable him to recover contribution

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[1] Newsam *v.* Finch, 25 Barb. (N. Y.) 175; Yelverton *v.* Shelden, 2 Sandf. Ch. (N. Y.) 481; Hunter *v.* Richardson, 1 Duv. (Ky.) 247.

[2] Albert *v.* Upton, 19 Pick. (Mass.) 434.

[3] Bonham *v.* Galloway, 13 Ills. 68; Brooks *v.* Ruff, 1 Ala. Sel. Cas. 409.

[4] Brooks *v.* Ruff, *supra.*

[5] United States Bank *v.* Stewart, 4 Dana (Ky.), 27.

[6] Brien *v.* Smith, 9 Watts & Serg. (Penn.) 78; Haven *v.* Foley, 18 Mo. 136.

[7] Chapman *v.* Jenkins, 31 Barb. (N. Y.) 164.

[8] Bobbitt *v.* Flowers, 1 Swan (Tenn.), 511.

have the benefit of it,[1] or he may at law recover its value from the surety who has received it.[2] In Massachusetts the enforcement of this rule has been refused at law,[3] but it is fully recognized as a doctrine of equity.[4]

§ 141. **Co-sureties entitled to the Benefit of Securities held by each other.** — A fund deposited by the principal debtor with one of his sureties as a security against the latter's liability will inure proportionally to the benefit of all the co-sureties.[5] In the absence of special circumstances all the sureties are entitled to share in the benefit of any indemnity which their co-surety may have taken from the principal debtor,[6] even though such indemnity may have been intended by the principal for the benefit of the latter surety alone.[7] Any security given to one surety and conditioned for the payment of the common indebtedness will inure to the benefit of all the co-sureties.[8] Persons who are subject to a common burden stand to each other upon a common ground of interest and of right; and whatever indemnity is furnished to one of them by him for whom the burden is assumed must be applied equally for the relief of all the associates.[9] If one surety gets possession of a fund belonging to the principal, he may not take the entire benefit of it, but must share it with his co-sureties.[1] If one who is a surety for the same principal on various liabilities, on some of which he has co-sureties, takes from his principal security generally for his protection, this is, for the benefit of his co-sureties, to be apportioned among all the demands *pro rata*.[2] But if one surety takes from his principal a mortgage for his protection against a particular debt, this will inure to the benefit of his co-sureties on that debt, and the mortgagee will have no right to apply the proceeds of the security to the payment of any other debt, to the prejudice of his co-surety.[3] To prevent circuity of action and attain the ends of natural justice, a court of equity will completely indemnify one of the sureties upon a bond by means of a lien upon the property of the principal existing in favor of another surety, notwithstanding the former surety has himself relinquished another lien upon the same property, originally created for his indemnification.[4] A mortgage executed to one or more of the sureties upon the official bond of an officer will inure to the benefit of all the sureties, as well those who subsequently become such under a proper and lawful order of court requiring additional sureties upon the bond, as those who were sureties at the date of the mortgage.[5] The same rule will be applied to property or securities deposited by one co-surety with another for their joint benefit, as to securities furnished by the principal;

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[1] Hinsdill *v.* Murray, 6 Vt. 136.

[2] Parham *v.* Green, 64 Nor. Car. 436.

[3] Bowditch *v.* Green, 3 Met. (Mass.) 360.

[4] New Bedford Savings Institution *v.* Hathaway, 134 Mass. 69, 72, *per* Devens, J.

[5] Berridge *v.* Berridge, 44 Ch. D. 168; Scribner *v.* Adams, 73 Maine, 541; Shaeffer *v.* Clendenin, 100 Penn. St. 565; Smith *v.* Conrad, 15 La. Ann. 579; Hall *v.* Robinson, 8 Ired. Law (Nor. Car.), 56; Hayden *v.* Cornelius, 12 Mo. 321; Aldrich *v.* Hapgood, 39 Vt. 617; Fishback *v.* Weaver, 34 Ark. 569.

[6] Brown *v.* Ray, 18 N. H. 102; Whiteman *v.* Harriman, 85 Ind. 49; Comegys *v.* State Bank, 6 Ind. 357; Fagan *v.* Jacocks, 4 Dev. Law (Nor. Car.), 263; Gregory *v.* Murrell, 2 Ired. Eq. (Nor. Car.) 233; Bobbitt *v.* Flowers, 1 Swan (Tenn.), 511; McMahon *v.* Fawcett, 2 Rand. (Va.) 514; Elwood *v.* Deifendorff, 5 Barb. (N. Y.) 398.

[7] Steel *v.* Dixon, 17 Ch. Div. 825; Cannon *v.* Connaway, 5 Del. Ch. 559; Hartwell *v.* Whitman, 36 Ala. 712.

[8] Logan *v.* Talbot, 59 Calif. 652; Paul *v.* Berry, 78 Ills. 158; State *v.* Berning, 74 Mo. 87, 98; Dye *v.* Mann, 10 Mich. 291; Bell *v.* Lamkin, 1 Stew. & P. (Ala.) 460; Low *v.* Smart, 5 N. H. 353; Lane *v.* Stacey, 8 Allen (Mass.), 41.

[9] Nally *v.* Long, 56 Md. 567;

Neely *v.* Bee, 32 W. Va. 519; McLewis *v.* Furgerson, 59 Ga. 644; Reinhart *v.* Johnson, 62 Iowa, 155; Miller *v.* Sawyer, 30 Vermont 412; Agnew *v.* Bell, 4 Watts (Pennsylvania), 31.

[1] Leary *v.* Cheshire, 3 Jones, Eq. (Nor. Car.) 170; Whipple *v.* Briggs, 28 Vt. 65; Boughner *v.* Hall, 24 W. Va. 249; Robinson *v.* Brooks 32 Ala. 222; Pinkston *v.* Taliaferro, 9 Ala. 547.

[2] Brown *v.* Ray, 18 N. H. 102; Goodloe *v.* Clay, 6 B. Mon. (Ky.) 236.

[3] Steele *v.* Mealing, 24 Ala. 285.

[4] West *v.* Belches, 5 Munf. (Va.) 187.

[5] Farmers' Bank *v.* Teeters, 31 Ohio St. 36.

each is entitled to his proportion, and only to his proportion thereof.[1]

§ 142. **A Surety cannot have Contribution from his Co-sureties without accounting for such Security.** — A surety who, being indebted to his principal or having received property or security from the principal, has paid the whole debt, cannot require contribution from his co-sureties without showing that this indebtedness or security has been properly disposed of, and is insufficient to satisfy the debt for which contribution is demanded.[2] If he has appropriated the security to himself by means of a collusive sale, he must account for it at a fair value.[3] If the security has not yet been disposed of, his remedy is in equity.[4] But if the surety who has paid the debt has received only a partial indemnity from his principal, he may recover from his co-surety the latter's proportionate share of the balance.[5] And if indemnity other than money has been provided by the principal for his sureties, but no satisfaction has been realized therefrom, this will not prevent the surety who has paid the debt from recovering contribution from his co-sureties.[6] The principal debtor having mortgaged to one of his sureties as security against his suretyship land worth less than half of the debt, and then become insolvent, the unsecured surety gave to the mortgagee half the amount of the debt, and the mortgagee agreed to pay the debt, and to give to the other surety half of all that he might receive from the principal debtor; and it was held that this promise included whatever he might realize upon the mortgage previously given to him by the principal.[7] But a mere indebtedness

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[1] Mitchell *v.* Bass, 24 Tex. 392.

[2] Davis *v.* Toulmin, 77 N. Y. 280; Neely *v.* Bee, 32 W. Va. 519; Morrison *v.* Poyntz, 7 Dana (Ky.), 307; Chilton *v.* Chapman, 13 Mo. 470.

[3] Sanders *v.* Weelburg, 107 Ind. 266; Owen *v* McGehee, 61 Ala. 440; Hall *v.* Robinson, 8 Ired. Law (Nor. Car.), 56.

[4] Morrison *v.* Poyntz, 7 Dana (Ky.), 307.

[5] Bachelder *v.* Fiske, 17 Mass. 464.

[6] Anthony *v.* Percifull, 8 Ark. (3 English), 494; Johnson *v.* Vaughn, 65 Ills. 425.

[7] Sheldon *v.* Welles, 4 Pick. (Mass.) 60.

on his co-sureties for contribution.[1] But if the security discharged is of unascertained value, it has been said that the only remedy of the co-sureties is in equity; they will still be liable for contribution at law.[2] Where one co-surety, having received security from the principal debtor, caused the same to be sold for enough to pay the debt, but never collected the money, it was held that he could not, upon afterwards paying the debt, recover any contribution thereto from his co-surety;[3] nor if, having collected the money, he had then procured the original debt to be assigned to a third person for his benefit, would such assignee be allowed in equity to collect anything from the co-surety.[4]

§ 144. **His Rights and Liabilities towards his Co-sureties.** — The surety who holds securities from his principal will be protected from loss if he manages them with prudence, good faith, and integrity; a mere change of the security, made in good faith, and not resulting in loss, will not discharge his co-sureties from liability for contribution.[5] If his security is a chattel mortgage, he is not bound to take possession of the property until he has paid the debt, or has reason to apprehend that he will be called upon to pay it, and that the property will be squandered; then, if he fails to take the proper steps to preserve the security, he may be charged by his co-sureties with the value of the property which by the exercise of due diligence he might have secured.[6] If he has taken a mortgage as security, with an agreement that it shall not be recorded, he cannot be charged by his co-sureties for failing to have it recorded.[7] He may, as against his co-sureties, be allowed for his necessary and reasonable expenses incurred in protecting the security,[1] but not for any expenses unnecessarily incurred without the consent of the co-sureties.[2] Where one of two sureties received from the principal debtor the latter's note for one-half of the debt, payable on demand, by which he might secure himself whenever he pleased, and afterwards took another note from the principal for goods sold to him, and then recovered judgment upon both notes, and collected on the execution enough to pay the whole of the first note and part of the second, and then, the principal having become insolvent, the sureties paid each one-half of the debt for which they were bound, the second surety being ignorant that the first had received any indemnity from the principal, it was held, on a bill in equity brought by the second surety against the first, that the first surety must account to the second for one-half of the amount of the indemnifying note that he had thus received from the principal.[3] Where one surety promised the principal debtor, if the latter would consent to the sale of certain property mortgaged by him to the creditor for the payment of the debt, the creditor being unwilling to sell it without such consent, to buy it if it should be sold for less than its value, and hold it for the common indemnity of himself and his co-sureties, it was decided, on the purchase being made in accordance with the agreement, that a trust immediately arose in favor of the co-sureties, which could be enforced at their instance; that the surety so purchasing would be responsible for the property with its proceeds and profits, and for all losses that could be prevented by the care and diligence which trustees are bound to exercise, and should be allowed the price which he paid for the property.[4]

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[1] Taylor *v.* Morrison, 26 Ala. 728; Ramsey *v.* Lewis, 30 Barb. (N. Y.) 403.

[2] Paulin *v.* Kaighn, 27 N. J. Law, 503; Johnson *v.* Vaughn, 65 Ills. 425; Anthony *v.* Percifull, 8 Ark. (3 English) 494.

[3] Chilton *v.* Chapman, 13 Mo. 470.

[4] Silvey *v.* Dowell, 53 Ills. 260.

[5] Carpenter *v.* Kelly, 9 Ohio, 106.

[6] Teeter *v.* Pierce, 11 B. Mon. (Ky.) 399.

[7] White *v.* Carlton, 52 Ind. 371

§ 145. **Surety may in Equity prevent Discharge of Security held by his Co-surety.** — One surety has no right to discharge to the prejudice of his co-surety a security taken for the indemnity of both.[1] In a case in Massachusetts, it appeared that A. sold goods to B., who mortgaged them to C., to secure the latter against liability upon a promissory note signed by B. as principal and by C. and D. as sureties. The mortgaged goods were levied upon in a suit against A., as having been sold by him in fraud of his creditors. C. then brought a suit against the attaching officer for a conversion of the goods, but afterwards agreed with the officer to discontinue the suit and discharge his mortgage, upon the officer's agreeing to pay part of the note and to collect the balance thereof from D.; and it was held that D. could maintain a bill in equity against the officer and C., to restrain the discontinuance of the suit and the discharge of the mortgage, and for leave to prosecute the action in his own behalf.[2]

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[1] Livingston *v.* Van Rensselaer, 6 Wend. (N. Y.) 63; Comegys *v.* State Bank, 6 Ind. 357.

[2] John *v.* Jones, 16 Ala. 457; Comegys *v.* State Bank, 6 Ind. 357.

[3] Miller *v.* Sawyer, 30 Vt. 412.

[4] Steele *v.* Brown, 18 Ala. 700.

§ 146. **Security held by one who is both a Creditor and a Surety.** — If one who is both a creditor and a surety takes security for the debt due to himself, as well as to indemnify himself from his liability upon his suretyship, he is entitled to appropriate so much of it as is necessary for the payment of his own claim in full.[3] But he cannot hold it against his co-sureties on account of demands against the debtor which he has obtained after taking the security, unless it was agreed when he took the security that he should obtain the other demands and hold the security for them also.[4] Though it is settled in equity that if one surety takes a security from the common principal for his own indemnity, this will inure to the benefit of all his co-sureties, yet, if he has a security for individual claims of his own against the same principal, he may hold this for his own benefit.[5]

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[1] Hayes *v.* Davis, 18 N. H. 600.

[2] Sheehan *v.* Taft, 110 Mass. 331.

[3] Wallace *v.* Greenlaw, 9 Lea (Tenn.), 115.

[4] Brown *v.* Ray, 18 N. H. 102. In Miller *v.* Sawyer, 30 Vt. 412, the second note was for an indebtedness incurred after the taking of the security.

[5] McCune *v.* Belt, 45 Mo. 174.

legal right to share in any indemnity or security which the defendant might afterwards obtain from the principal.[1]

§ 148. **Right of one Surety to stipulate, on becoming such, for a Separate Indemnity to himself.** — But if one surety on becoming such stipulates for and receives from his principal a separate indemnity, this is his exclusively; and his co-sureties can claim from him only the surplus of the proceeds thereof over what is necessary for his indemnification;[2] so also, if the co-surety obtains indemnity from a third party.[3] He has the right so to stipulate for a separate indemnity to himself, and to apply that indemnity upon his portion of the common liability to his own relief; and such an indemnity can be reached by his co-sureties only when it was taken in fraud of their rights or for their common benefit.[4] And one surety is not entitled to the benefit of a mortgage which was given and is conditioned merely to indemnify his co-surety after the co-sureties had adjusted their loss by each of them paying one-half of the sum for which they were bound.[5] Though whatever payment one surety may receive from the principal must in general inure to the benefit of all, yet, where payment of the debt for which all were liable has been made by one, and the claim against each for contribution has become fixed, each may on his separate account look to the principal for the reimbursement of his own share.[6] And one of two sureties who has actually paid the whole debt for which both were liable may recover from the other surety half of the amount thereof, although, since such payment, he may have received from the principal the other half expressly for his separate indemnity.[7]

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[1] Tyus *v.* De Jarnette, 26 Ala. 280.

[2] Titcomb *v.* McAllister, 81 Maine, 399; Moore *v.* Moore, 4 Hawks (Nor. Car.), 358.

[3] Leggett *v.* McClelland, 39 Ohio St. 624.

[4] Thompson *v.* Adams, 1 Freem. (Miss.) 225.

[5] Hall *v.* Cushman, 16 N. H. 462.

[6] Gould *v.* Fuller, 18 Maine, 364; Messer *v.* Swan, 4 N. H. 481.

[7] Gould *v.* Fuller, *supra*; Paulin *v.* Kaighn, 27 N. J. Law, 503.

§ 149. **A Co-surety called upon for Contribution becomes thereby entitled to Subrogation.** — If one surety calls upon his co-surety for contribution, he must at the same time permit the latter to share in all the rights to which he has himself been subrogated by his payment.[1] So one surety for the payment of a judgment, if he is held to contribute for the benefit of a co-surety who has paid the judgment, will thereupon be subrogated to the lien of the judgment upon the land of the judgment-debtor.[2] And if the surety who has paid the debt has discharged the principal from liability therefor, then, as this would prevent the subrogation of the co-sureties against the principal, they cannot be compelled to contribute for the relief of the surety who has made the payment.[3]

§ 150. **Subsequent Sureties not entitled to Indemnity provided for Prior Sureties.** — Although the rights of co-sureties against each other are not affected by the fact that they became sureties at different times,[4] by different instruments,[5] or even without each other's knowledge,[6] if only they are as among themselves co-sureties,[7] yet sureties who bind themselves after the liability of the original sureties has become fixed are not entitled to share in the benefit of an indemnity provided for the original sureties.[8] Parties to a promissory note are *prima facie* liable successively in the order fixed by the note. Accordingly, the accommodation-maker of a note cannot treat a mortgage given to the subsequent accommodation indorser thereof by the party for whose benefit the note was made, conditioned for the indemnity of the indorser, as a security taken by the indorser for the benefit of both of them, even though the indorser has since purchased the equity of redemption in the mortgaged property; the maker is liable to the indorser on the latter's taking up the note, for the amount thereof, less only the actual value of the security.[1] If, however, there are two successive accommodation indorsers of a note, and the second indorser, having been furnished by the maker with means to pay the note, promises the first indorser to apply these means for that purpose, and thereby lulls the first indorser into inaction which would result in his injury if held to pay the note, this promise creates an equity in favor of the latter which will support an action by him against the second indorser.[2] The principal in a bond assigned a claim to a trustee for the indemnity of his sureties, in trust to collect the claim and apply its proceeds to the payment of the bond. Before the claim was collected, a suit was brought upon the bond; and the sureties contributed ratably to its payment. One of the sureties having obtained a decree against the principal for what he had paid, took the principal in execution, and obtained from him a bond with sureties, which was afterwards forfeited, and the new sureties paid the amount of the decree. The trustee having afterwards collected the claim assigned to him, it was held that the new sureties could not participate in this trust fund, by subrogation to the rights of the original surety whom they had satisfied; that the surety who had obtained the new bond was bound to proceed thereon against the sureties therein, and could come upon the trust-fund only for any deficiency in

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[1] Arcedeckne, *in re*, 24 Ch. D. 709: Stanwood *v.* Clampitt, 23 Miss. 372.

[2] Green *v.* Milbank, 56 How. Pr. (N. Y.) 382.

[3] Fletcher *v.* Jackson, 23 Vermont, 581.

[4] Warner *v.* Morrison, 3 Allen (Mass.), 566; Powell *v.* Powell, 48 Calif. 235; Monson *v.* Drakeley, 40 Conn. 552; Bosley *v.* Taylor, 5 Dana (Ky.), 157.

[5] Armitage *v.* Pulver, 37 N. Y. 494; Bell *v.* Jasper, 2 Ired. Eq. (Nor. Car.) 597; Jones *v.* Blanton, 6 *Id.* 115; Loring *v.* Bacon, 3 Cush. (Mass.) 465; Young *v.* Shunk, 30 Minn. 503.

[6] Norton *v.* Coons, 3 Denio (N. Y.), 130; Chaffee *v.* Jones, 19 Pick. (Mass.) 260; Craythorne *v.* Swinburne, 14 Ves. 160.

[7] Blake *v.* Cole, 22 Pick. (Mass.) 97; Taylor *v.* Savage, 12 Mass. 98; Wells *v.* Miller, 66 N. Y. 255; McPherson *v.* Talbot, 10 Gill & J. (Md.) 499; Robertson *v.* Deatherage, 82 Ills. 511; Salyers *v.* Ross, 15 Ind. 130.

[8] *Antea*, § 131 *et seq;* Harnsberger *v.* Yancey, 33 Gratt. (Va.) 527.

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[1] Post *v.* Tradesmen's Bank, 28 Conn. 420.

[2] Rice *v.* Truesdell, 28 N. J. Eq. 200.

which it was taken by the creditor may be evidence of this value.[1] One of the sureties of an administrator who has bought up at a discount legacies, for the payment of which the sureties were bound, will be allowed to charge his co-surety only with his proportion of the expense actually incurred therefor.[2] A surety cannot by means of an assignment of the creditor's remedies recover from his co-sureties more than their reasonable proportions of what he has himself paid.[3] Nor will sureties upon one obligation have any equitable right to securities given by the same debtor to his sureties upon a different obligation.[4] A surety will not, as against his co-sureties, be subrogated to any remedies for a debt which his co-sureties had the right to require him to discharge.[5] The doctrine of contribution between co-sureties is not founded upon contract, but is the result of general equity.[6] And any interference by the creditor with the sureties' right of subrogation against each other will, to the extent of the injury received thereby, discharge the sureties who are so injured,[7] just as a similar interference with their right of subrogation against their principal would have discharged

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Marsh. (Ky.) 555; Edmonds *v.* Sheahan, 47 Tex. 443; Jordan *v.* Adams, 7 Ark. (2 English) 348.

[1] Jones *v.* Bradford, 25 Ind. 305.

[2] Tarr *v.* Ravenscroft, 12 Gratt. (Va.) 642.

[3] New Bedford Savings Institution *v.* Hathaway, 134 Mass. 69; Kelly *v.* Page, 7 Gray (Mass.), 213.

[4] Lacy *v.* Rollins, 74 Tex. 566.

[5] McCrory *v.* Parks, 18 Ohio St. 1.

[6] Dering *v.* Winchelsea, 1 Cox, Ch. Cas. 318; Dennis *v.* Gillespie, 24 Miss. 581; Brindle *v.* Page, 21 Vt. 94; Fletcher *v.* Grover, 11 N. H. 368.

[7] Stirling *v.* Forrester, 3 Bligh, 575; Hodgson *v.* Hodgson, 2 Keen, 704; Evans *v.* Bremridge, 2 Kay & Johns. 174; McKim *v.* Demmon, 130 Mass. 404; Greenfield Savings Bank *v.* Stowell, 123 Mass. 196; Howe *v.* Peabody, 2 Gray (Mass.), 556; Smith *v.* United States, 2 Wallace, 219; Shock *v.* Miller, 10 Penn. St. 401; Klingensmith *v.* Klingensmith, 31 Penn. St. 460; Ide *v.* Churchill, 14 Ohio St. 372; State *v.* Van Pelt, 1 Smith (Ind.), 118; Martin *v.* Taylor, 8 Bush (Ky.), 384; Mitchell *v.* Burton, 2 Head (Tenn.), 613; Jemison *v.* Governor, 47 Ala. 390; Lower *v.* Buchanan Bank, 78 Mo. 67; State *v.* Matson, 44 Mo. 305; Dodd *v.* Winn, 27 Mo. 501; Rice *v.* Morton, 19 Mo. 263. *Contra*, where the sureties were under a several liability, Teutonia Bank *v.* Wagner, 37 La. Ann. 732.

them.[1] The same right exists between co-sureties to be relieved to the extent of the share of each in the debt by the acts of the creditor as exists between them and their principal to be relieved of the whole debt by similar acts of the creditor with their principal;[2] and when the creditor by his acts discharges one surety, or abandons a lien upon his property for the debt, he can hold the other surety only for a *pro rata* share of the debt.[3] This doctrine is to be limited in the same manner, and with similar diversities of the decisions, as is the case with the similar doctrine of the release of the sureties by the creditor's interference with their rights against their principal.[4]

§ 152. **One Surety holding Security from the Principal holds it for the Whole Debt.** — As one of several sureties who holds security from the principal debtor to secure him against his suretyship holds it *prima facie* for the benefit of his co-sureties as well as of himself, so he has a valid lien upon it, as against his principal, for the whole debt.[5] Accordingly, where the principal maker of a note which was also signed by three others as his sureties made a mortgage of personal property to one of his sureties conditioned to indemnify him against his liability for the debt, the mortgagee was allowed, in an action against the mortgagor's assignee in insolvency, who had sold the property, to recover the proceeds of this property to the extent of his legal liability upon the note, although he had paid no part of the amount due thereon, and his co-sureties were equally liable with himself for the payment thereof, and although the consideration named in the mortgage was only one-third of the amount of the note; and parol evidence was held to be inadmissible to show that the principal debtor had intended in giving the mortgage to secure the mortgagee only to the extent of one-third of what was due upon the note, under the belief that this would be a full indemnity for his liability.[1]

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[1] *Antea*, § 119 *et seq.*

[2] Lewis *v.* Armstrong, 80 Ga. 402; Waggoner *v.* Walrath, 24 Hun (N. Y.), 443.

[3] *Ex parte* Gifford, 6 Vesey, 805; Stirling *v.* Forrester, 3 Bligh, 575; Rice *v.* Morton, 19 Mo. 263; People *v.* Buster, 11 Calif. 215; Gordon *v.* Moore, 44 Ark. 349; North American Ins. Co. *v.* Handy, 2 Sandf. Ch. (N. Y.) 492. And see Smith *v.* State, 46 Md. 617; State *v.* Atherton, 40 Mo. 209; Alexander *v.* Byrd, 85 Va. 690.

[4] *Antea*, § 119 *et seq.* And see Ward *v.* New Zealand Bank, 8 App. Cas. 755; Clarke *v.* Birley, 41 Ch. D. 422; Collins *v.* Prosser, 1 Barn. & Cress. 682; s. c., 3 Dowl. & Ry. 112; Thompson *v.* Lack, 3 Man., Gr. & Sc. 540; Hood *v.* Hayward, 26 Abbott New Cas. (N. Y.) 271, affirming s. c., 48 Hun, 330; Wilbur *v.* Williams, 16 R. I. 242; Chipman *v.* Todd, 60 Maine, 282; Frederick *v.* Moore, 13 B. Mon. (Ky.) 470; Hewitt *v.* Adams, 1 Patton & Heath (Va.), 34; Ide *v.* Churchill, 14 Ohio St. 372.

[5] McWhorter *v.* Wright, 5 Ga. 555; Bellune *v.* Wallace, 2 Rich. Law (So. Car.), 80; Pringle *v.* Sizer, 2 Rich. N. S. (So. Car.) 59; Tunnell *v.* Jefferson, 5 Harringt. (Del.) 206; Miller *v.* Howry, 3 Pen. & Watts (Penn.), 374.

§ 153. **Co-sureties' Right of Subrogation subject to Legal Rights of Third Parties.** — The equitable right of one surety upon his payment of the debt to be subrogated to the benefit of securities or property of the principal in the hands of a co-surety must yield to rights which have accrued to others upon the strength of the apparent legal title to such property. Accordingly, where an absolute deed of land was made to three persons, for the real purpose of securing them against their liability as sureties for a debt of the grantor, and they agreed to reconvey the land to him upon his payment of the debt, and then two of the sureties were compelled to pay the debt, the grantor and the other surety having become insolvent, it was held that the levy of an execution by a creditor of the insolvent surety upon the latter's undivided portion of the land vested in such creditor the title to that portion, unaffected by any equitable claims of the sureties who had paid the debt.[2]

§ 154. **The Creditor may be substituted to the Benefit of Security for the Debt held by a Surety.** — A creditor has also an equitable right to be substituted to the benefit of any collateral security for the debt which the principal debtor has

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[1] Barker *v.* Buel, 5 Cush. (Mass.) 519.

[2] Jewett *v.* Bailey, 5 Greenl. (Me.) 87.

surety to surrender to him any peculiar means which have been intrusted by the principal debtor to the surety for the purpose of securing the payment of the debt, such as a mortgage on real or personal property, or any other collateral security held by the surety.[1]

§ 155. **Security held by a Surety regarded as a Trust for the Payment of the Debt.** — The security for the debt, in whosesoever hands it may be, is treated as a fund held in trust for the payment of the debt:[2] if in the hands of the creditor, the surety, upon paying the debt, will be subrogated to it for his indemnity; if in the hands of a surety, the creditor may resort to it to secure the payment of his demand.[3] Accordingly, such a security may by agreement of the parties be passed to a stranger, upon his paying the original debt at the request of the debtor, and will be enforceable in the hands of such stranger.[4] All demands received by the surety from the principal debtor for the purpose of discharging the debt, either by their transfer to the creditor or by the payment of their proceeds to the creditor, are held by the surety in trust for the creditor.[5] Equity, regarding the security as a trust fund created for the payment of the debt, will compel the surety to apply it for that purpose,[6] and a voluntary transfer of such a security by the surety to the creditor will be upheld as if it had been made under a decree of the court.[7] The effect of a mortgage or other security given by the principal debtor to his surety, conditioned that the principal will himself pay the debt and hold the surety harmless therefrom, is to create a trust and an equitable lien for the creditor;[1] and the surety will hold the property subject to such trust, even though his own liability may have been defeated by his decease or by the operation of the Statute of Limitations,[2] or by the creditor's indulgence given to the principal debtor.[3] The surety cannot defeat this trust by a conveyance of the property, except it be to a *bona fide* purchaser for value without notice;[4] and the record of such a mortgage of real estate will be constructive notice of the trust,[5] so that creditors of the surety, or purchasers from him, even after his foreclosure of the mortgage, cannot, by means of an attachment or conveyance of the property, take it discharged of the trust;[6] nor will it be defeated by the subsequent insolvency or bankruptcy of the principal and the surety, or either of them.[7] By such a mortgage the property is pledged to the surety for the payment of the mortgagor's debt; and the pledge is not redeemed, nor the equitable lien discharged, until the debt is actually paid.[8] The surety cannot himself discharge the trust or relieve the property from the burden to the prejudice of the creditor.[9] He may obtain security for the creditor, but he cannot discharge it.[10]

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[1] *Redfield*, *Ch.*, in McCollum *v.* Hinckley, 9 Vt. 143, 149; Varney *v.* Hawes, 68 Maine, 442; Matthews *v.* Joyce, 85 Nor. Car. 258; Cannon *v.* McDaniel, 46 Tex. 304.

[2] Pratt *v.* Thornton, 28 Maine, 355; Clark *v.* Ely, 2 Sandf. Ch. (N. Y.) 166; Price *v.* Trusdell, 28 N. J. Eq. 200; Daniel *v.* Joyner, 3 Ired. Eq. (Nor. Car.) 513; Montgomery's Succession, 2 La. Ann. 469.

[3] New London Bank *v.* Lee, 11 Conn. 112; Holmes *v.* Bacon, 28 Miss. 607; Heid *v.* Vreeland, 30 N. J. Eq. 591.

[4] First National Bank of Madison *v.* Schlusser, 2 S. W. Rep. 145.

[5] Barton *v.* Croydon, 63 N. H. 417; Holt *v* Penacook Savings Bank, 62 N. H. 551; Kunkel *v.* Fitzhugh, 22 Md. 567; Mast *v.* Raper, 81 Nor. Car. 330; Green *v.* Dodge, 6 Ohio, 80.

[6] United States *v.* Sturges, 1 Paine, C. C. 525; Paris *v.* Hulett, 26 Vt. 308; Vail *v.* Foster, 4 N. Y. 312; Ross *v.* Wilson, 7 Sm. & M. (Miss.) 753.

[7] Paris *v.* Hulett, 26 Vt. 308; Carlisle *v.* Wilkins, 51 Ala. 371.

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[1] Markell *v.* Eichelberger, 12 Md. 79; McMullen *v.* Neal, 60 Ala. 552; Richards *v.* Yoder, 10 Neb. 429.

[2] Crosby *v.* Crafts, 5 Hun (N. Y.), 327; Eastman *v.* Foster, 8 Met. (Mass.) 19; Cowan *v.* Telford 5 Lea (Tenn.), 449.

[3] Helm *v.* Young, 9 B. Mon. (Ky.) 394.

[4] McRady *v.* Thomas, 16 Lea (Tenn.), 173; Carpenter *v.* Bowen, 42 Miss. 28; Ross *v.* Wilson, 7 Sm. & M. (Miss.) 753; Seibert *v.* Thompson, 8 Kans. 65.

[5] Ijames *v.* Gaither, 93 Nor. Car. 358; Blackwood *v.* Jones. 4 Jones Eq. (Nor. Car.) 54.

[6] Eastman *v.* Foster, 8 Met. (Mass.) 19; Vail *v.* Foster, 4 N. Y. 312.

[7] Carlisle *v.* Wilkins, 51 Ala. 371; Eastman *v.* Foster, 8 Met. (Mass.) 19.

[8] Aldrich *v.* Blake, 134 Mass. 582; *Shaw, C. J.*, in Eastman *v.* Foster, *supra;* Graydon *v.* Church, 7 Mich. 36.

[9] Osborn *v.* Noble, 46 Miss. 449; McMullen *v.* Neal, 60 Ala. 552.

[10] Simson *v.* Brown, 6 Hun (N. Y.), 251.

§ 156. **Creditor's Right to Security held by a Surety who is also a Creditor of the Principal.** — It has sometimes been held in Kentucky and in Mississippi that a mortgage given by a principal debtor to his sureties, both to protect them against the debt for which they are sureties and to secure a debt due to them from himself, will be applied to the payment of both debts *pro rata.*[1] The rule has been laid down that since the sureties are *quasi* trustees for the creditor in respect to such security, they are bound to pay over the first proceeds thereof to the common creditor, instead of applying them upon their own demand or paying them to their own general creditors.[2] If the circumstances of the case are such as to show what was intended to be the priority of the respective parties, that intent will be carried out.[3] Neither the creditor nor the surety can destroy the rights of the other in such a security; each will be protected from injury by the acts of the other.[4] The right of the surety to apply the security to the payment of his own demand before meeting that upon which he is liable as surety, has also been maintained.[5] The claim of the principal creditor to the benefit of such a security must be seasonably asserted.[6] The principal debtor on a promissory note gave to the surety a mortgage conditioned that the principal should pay the note to the promisee thereof and hold the surety harmless therefrom, and should also pay a debt due from himself to the mortgagee; but the payee of the note did not make his loan under the inducement of the mortgage; nor was the mortgage made for his benefit or at his request. The principal paid the interest on the loan for

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[1] Willis *v.* Caldwell, 10 B. Mon. (Ky.) 199; Helm *v.* Young, 9 B. Mon. (Ky.) 394; Moore *v.* Moberly, 7 B. Mon. (Ky.) 299, 301; Ross *v.* Wilson, 7 Sm. & M. (Miss.) 753.

[2] Fourth National Bank's Appeal, 123 Penn. St. 473; Skillman *v.* Teeple, 1 N. J. Eq. 232; Ten Eyck *v.* Holmes, 3 Sandf. Ch. (N. Y.) 428.

[3] Parsons *v.* Clark, 132 Mass. 569; Waller *v.* Oglesby, 85 Tenn. 321; Cannon *v.* McDaniel, 46 Tex. 304.

[4] Edwards *v.* Helm, 4 Scam. (Ills.) 142.

[5] First Congregational Society *v.* Snow, 1 Cush. (Mass.) 510; *antea,* § 146.

[6] Waller *v.* Oglesby, 85 Tenn. 321.

a bare indemnity given to the surety by a stranger,[1] or by one co-surety to another.[2] When the surety was secured by a pledge of the rents of certain property, and afterwards became the holder of the legal title to the property, operating a merger of the pledge as between the principal and the surety, it was held that the creditor had no longer any right of substitution to the merged security;[3] but if equity would prevent a merger, then the creditor's right would remain unaffected.[4] If the condition of the surety's indemnity was that the principal should thus save the surety harmless by paying the debt in case he should be required by law to pay it, and it appears that the principal was not legally liable upon the debt and that the surety has not been damnified, the creditor cannot have the benefit of the security.[5] So, if the surety's rights were created by a trust-deed which provided that, upon the recovery of judgment against the surety and the principal's failure to satisfy the same, the trustee should sell the property, the creditor could not subject the trust property to the payment of his claim without first obtaining judgment against the surety.[6] If the liability of the surety is contingent, as is that of an accommodation indorser of a note, the creditor cannot be substituted to the benefit of a security held by the surety for his indemnity until this liability has become fixed; and if the indorser has been discharged by the laches of the creditor, the latter's right of substitution is gone.[7] If the surety holds the property only by a conveyance which is fraudulent as against the general creditors of the principal debtor, the creditor's right can be no better than that of the surety, and will not prevail against the principal's general creditors.[1]

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[1] Taylor *v.* Farmers' Bank, 87 Ky. 398.

[2] Hampton *v.* Phipps, 108 U. S. 260; Morgan *v.* Francklyn, 55 How. Pr. (N. Y.) 244.

[3] Rankin *v.* Wilsey, 17 Iowa, 463.

[4] *Antea,* § 57 *et seq.* Durham *v.* Craig, 79 Ind. 117.

[5] Bibb *v.* Martin, 14 Sm. & M. (Miss.) 87.

[6] Bush *v.* Stamps, 26 Miss. 463.

[7] Tilford *v.* James, 7 B. Mon. (Ky.) 336; Hopewell *v.* Cumberland Bank, 10 Leigh (Va.), 206; Higgins *v.* Wright, 43 Barb. (N. Y.) 461.

§ 158. **Security given merely to indemnify Sureties cannot be enforced after Sureties discharged.** — A security given to sureties merely to indemnify them against their suretyship cannot be enforced after the creditor has discharged the sureties. And where a debtor gave to his sureties such a mortgage to protect them against their suretyship, the mortgage was held to be extinguished by their assigning it to the creditor for his security and taking from him a discharge of their liability; for as it was given merely to protect the sureties from their liability, and as that protection had been obtained by their discharge, the condition of the mortgage was fulfilled.[2] So where the surety, having received from the principal a promissory-note for his indemnity, handed this over to the creditor, and the creditor brought suit upon it against the principal, it was held that if the remedy against the surety upon the original debt was barred by the Statute of Limitations, there was a failure of the consideration of the note, and the creditor could not recover. But if the surety had given this note to the creditor in payment of his liability, then it would be no defence to the principal, when sued upon this substituted note, that the remedy upon the principal obligation had now become barred by the lapse of time.[3]

§ 159. **When the Surety's Transfer of his Indemnity to the Creditor does not extinguish it.** — The transfer by a surety to the creditor of an indemnity received by the former from the principal will not always extinguish the security in equity, if the transfer is made in payment of the debt[4] or in consideration of the release of the surety by the creditor.[5] A judgment given by a principal debtor to his surety as an indemnity against his suretyship may be available before the surety is actually damnified; for the surety may use it to compel the payment of the debt by the principal; and upon the assignment of such a judgment by the surety to the creditor, the latter may, to the extent of his demand, collect it from the proceeds of the debtor's real estate upon which it was a lien.[1] If the principal debtor gives to his surety a mortgage, conditioned that the principal shall save his surety from any trouble or expense by reason of his suretyship, and the surety assigns this mortgage to the creditor in consideration of his release by the latter from any other liability than the use of his name in the collection of the original debt, this assignment will not extinguish the security; and the creditor can hold the mortgaged premises until they are redeemed by the payment of the debt.[2] The surety has a right, for his protection, to apply the property to the payment of the debt;[3] and the creditor may require this application.[4] When an agent has undertaken to obtain security from a debtor of his principal, but has so negligently conducted himself therein as to become himself liable for the loss to his principal, and thereupon procures from the debtor a mortgage to himself for his protection against such liability, and subsequently, the debtor having become insolvent, assigns this mortgage to his principal, this assignment will not in equity extinguish the mortgage for the benefit of a subsequent mortgagee of the same premises, but the creditor will be allowed the full advantage thereof, to the extent of the agent's liability to him.[5]

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[1] Thrall *v.* Spencer, 16 Conn. 139.

[2] Sumner *v.* Bachelder, 30 Maine, 35.

[3] Russell *v.* La Roque, 13 Ala. 149.

[4] Howe *v.* Freidheim, 27 Minn. 294; Morgan *v.* Dod, 3 Color. 551; McBeth *v.* McIntyre, 57 Calif. 49.

[5] Carlisle *v.* Wilkins, 51 Ala. 371.

§ 160. **Surety's Indemnity not available to the Creditor unless Insolvency intervenes.** — If the contract upon which a surety

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[1] Bank *v.* Douglass, 4 Watts (Penn.), 95; Phillips *v.* Thompson, 2 Johns. Ch. (N. Y.) 418.

[2] Hayden *v.* Smith, 12 Met. (Mass.) 511.

[3] Simmons *v.* Goodrich, 68 Ga. 750; Cooley *v.* Osborne, 50 Iowa, 526.

[4] Hauser *v.* King, 76 Va. 731.

[5] Grant *v.* Ludlow, 8 Ohio St. 1.

§ 161. **Application of these Principles in Connecticut.** — A debtor mortgaged certain real estate to B., to secure the latter for accepting his bills to a large amount, the condition of the mortgage being that the debtor should pay all such acceptances at their maturity, and save B. harmless therefrom. Afterwards, the debtor desiring to obtain a loan from a bank, an arrangement was made by which B. mortgaged to the bank all his interest in the premises as security for such loan, and the bank made a loan to the debtor upon this security. Both the debtor and B. were at this time solvent and in good credit; but they both soon afterwards became insolvent, the bank's loan being unpaid, and B.'s acceptances being still outstanding in the hands of parties to whom they had been negotiated. The holders of these acceptances then claimed that the mortgaged premises should be applied to their payment; but it was held that this mortgage was to be regarded as a personal security created for the indemnity of B., and not to secure the payment of the bills; that while the parties were solvent the holders of the bills had no equitable right to the security; and in the meantime, until such equitable right arose upon the insolvency of the debtors, B. had a perfect right to surrender his security, or, with the concurrence of the debtor, to transfer it to the bank as a security for a new loan; and that the rights of the bank to the security were not affected by the equity which afterwards, upon the failure of the debtor and of B., arose in favor of the holders of the bills.[1]

§ 162. **The Creditor is entitled to the Benefit of the Surety's Indemnity when Insolvency intervenes.** — But the creditor will be entitled, upon the insolvency of the principal and the surety, to the benefit of security held by the surety from the principal merely for indemnity,[2] if the creditor has not waived this right by proving his demand as an unsecured one against the estates of those who are liable to him thereon.[1] Where an assignment of property was made to secure an indorser against the payment of certain notes indorsed by him, and he sold the property and converted it into money, and then became insolvent, the notes being unpaid, and the maker being also insolvent, it was held that this money, having been kept separate from his other property, did not pass to his assignees in bankruptcy, but that equity would follow the fund, and apply it to the payment of the notes.[2] Where the purchaser of land procured a third person to give his note to the vendor for the price thereof, and to secure the maker of the note gave him a bond and mortgage on the land purchased, and the maker of the note became insolvent before it fell due, the vendor of the land was held to be entitled to the benefit of the bond and mortgage.[3] The same rule has been applied upon the insolvency of the principal and the death of the surety who held the indemnity,[4] and also upon the bare insolvency of the principal.[5] But to give this right of substitution to the creditor, the relation of debtor and creditor must still subsist, both between the creditor and the surety,[6] and also between the creditor and the principal.[7] And if the surety has lost his lien, the creditor's equitable right of substitution thereto is also destroyed.[8]

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[1] Jones *v.* Quinnipiac Bank, *supra.*

[2] Pierce, *in re*, 2 Lowell, 343; Foye, *in re*, 16 N. B. R. 572; Fickett, *in re*, 72 Maine, 266; Kelly *v.* Herrick, 131 Mass. 373; Thompson *v.* Taylor, 12 R. I. 109; Keyes *v.* Brush, 2 Paige

§ 163. **Surety's Indemnity sometimes treated as a Trust for the**

(N. Y.), 311; Chaffe *v.* Lisso, 33 La. Ann. 206; King *v.* Harman, 6 La. 607.

[1] New Bedford Savings Institution *v.* Fairhaven Bank, 9 Allen (Mass.), 175; Foye, *in re*, Morris, *ex parte*, 16 N. B. R. 572; Loder's Case, L. R. 6 Eq. 491.

[2] Kip *v.* New York Bank, 10 Johns. (N. Y.) 63, 65.

[3] Vail *v.* Foster, 4 N. Y. 312.

[4] Moses *v.* Murgatroyd, 1 Johns. Ch. (N. Y.) 119.

[5] Dick *v.* Truly, 1 Sm. & M. (Miss.) Ch. 557; Tilford *v.* James, 7 B. Mon. (Ky.) 336.

[6] Constant *v.* Matteson, 22 Ills. 546; Tilford *v.* James, 7 B. Mon. (Ky.) 336; Foye, *in re*, 16 N. B. R. 572.

[7] Watson *v.* Rose, 51 Ala. 292. It was upon another point that this case was overruled by Smith *v.* Gillam, 80 Ala. 296.

[8] Foye, *in re*, 2 Lowell, 424; s. c., 16 N. B. R. 572.

Payment of the Debt. — The broad doctrine has also been often asserted that equity will regard security given by a principal debtor to his surety, though merely for the surety's indemnity, as a trust created for the payment of the debt, and will see that it is applied for that purpose, by substituting, if necessary, the creditor to its benefit.[1] So it has been held that in chancery, on the creditor's application, a fund pledged by the principal for the indemnity of the surety will be applied directly to the payment of the debt, if the surety is liable for its immediate payment, and could upon his payment resort at once to this fund for his indemnity.[2] On this principle an accommodation indorser for a firm, who has been held to payment upon his indorsement, has been subrogated for his protection to the benefit of bonds given by each partner to the other upon the dissolution of the firm, to protect each respectively from the debts that were assumed by the other.[3] Where the creditor recovered judgment against both the principal and the surety, and, the other property of the principal being insufficient to satisfy the judgment, the surety directed the sheriff to levy the execution upon property mortgaged by the principal to him for his indemnity, which was accordingly done, it was held that the sale of this property upon the execution was valid and absolute, and that it extinguished the lien of the surety's indemnifying mortgage.[4]

§ 164. **Partial Surety not to be harmed by the Substitution of the Creditor to his Indemnity.** — But a surety who is not liable for the whole debt[5] is not to be harmed by the creditor's appropriation of his indemnity; it must be applied first

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[1] Burroughs *v.* United States, 2 Paine, C. C. 569; Branch *v.* Macon R. R. Co., 2 Woods, C. C. 385; Thornton *v.* Exchange Bank, 71 Mo. 222; Breedlove *v.* Stump, 3 Yerg. (Tenn.) 257; Martin *v.* Bank, 31 Ala. 115.

[2] Constant *v.* Matteson, 22 Ills. 546; Baltimore & Ohio R. R. Co. *v.* Trimble, 51 Md. 99.

[3] Ingles *v.* Walker, 37 Ga. 256.

[4] Exline *v.* Lowery, 46 Iowa, 556.

[5] See Kelly *v.* Herrick, 131 Mass. 373.

and other obligations.[1] Where a surety upon several promissory notes takes a mortgage from the principal, conditioned that the principal shall pay the notes and so save the surety harmless therefrom, and so holds the mortgage in trust for the holders of the notes, and he remains personally liable on only one of the notes, and the principal debtor is insolvent, the mortgaged property, if sufficient to pay all the notes, will be applied for that purpose, and any surplus will be distributed among the general creditors of the mortgagor; but if the mortgaged property is insufficient to pay all the notes, it will be first applied for the indemnification of the surety, by paying in full, if necessary, the note on which he remains liable, and the surplus will be applied to the payment of the other notes *pro rata.*[2]

§ 165. **Creditor cannot be substituted to a Security not created against his Debt.** — Although a creditor of a mortgagee may, by substitution in equity, avail himself of the rights of the mortgagee under a mortgage made to secure the debt which he is seeking to recover, and which is due to himself, yet he cannot do so unless the mortgage was made to secure that very debt;[3] and the fact that a mortgagee has joined with his mortgagor as the latter's surety in a bond given by him to a second mortgagee of the same premises, gives the second mortgagee no equitable interest in the lien of the prior mortgage; nor in such a case would the insolvency of both the mortgagor and the prior mortgagee entitle the junior mortgagee, in the absence of any fraud practised upon him, to be substituted to the rights of the prior mortgagee.[4] Nor can the plaintiff in an action for the recovery of a debt hold money which has been deposited by a third person with a deputy sheriff as security to the deputy that persons whom he has accepted as bail of the defendant will justify as such bail.[1]

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[1] Newson *v.* McLendon, 6 Ga. 392.

[2] Eastman *v.* Foster, 8 Met. (Mass.) 19.

[3] Shackleford *v.* Stockton, 6 B. Mon. (Ky.) 390; Seward *v.* Huntington, 94 N. Y. 104, reversing s. c. 26 Hun (N. Y.), 217, and distinguishing Lawrence *v.* Fox. 20 N. Y. 268.

[4] Brant *v.* Clark, 27 N. J. Eq. 234.

§ 166. **Cases in which a Creditor has sought to be substituted to Securities held by a Surety or by one under a Secondary Liability.** — The principal debtor and two sureties having joined in an obligation to the creditor, the principal gave to one of the sureties a mortgage to secure its payment and save the sureties from loss. Afterwards the mortgagor and the mortgagee joined to convey an interest in the mortgaged property to a stranger, who retained in his hands a portion of the purchase-money to meet the charges thereon. The holder of the original obligation then claimed that he was entitled to be paid out of the mortgaged property, by substitution to the benefit of the mortgage; and it was held that he had a right to be so paid; and that this equitable right of his was not affected by the mortgagee's having joined in the conveyance to the stranger, especially as the latter had not only had notice of the mortgage, and consequently of the rights of the creditor thereto, but also had actually retained in his hands a portion of the purchase-money for his protection therefrom.[2] A mortgage which recited that the mortgagee had indorsed certain notes for the accommodation of the mortgagor, upon the condition that the mortgage should be given to secure him from any loss that he might sustain in consequence of the maker's non-payment of the notes at their maturity, was conditioned to be void if the mortgagor should pay the notes or should repay the mortgagee upon the latter's paying them, and provided that the proceeds of any sale of the mortgaged premises should be applied to the payment of all claims of the mortgagee under the mortgage, whether then or thereafter payable, was held to constitute not merely an indemnity to the indorser, but a security for the payment of the notes, so that any *bona fide* holder of the notes might maintain a bill to foreclose it, and his rights would not be affected by a release given by the mortgagee.[1] But it has been decided in New Jersey that a mortgage given by a guardian to the sureties upon his guardianship bond, conditioned to be void if the guardian should comply with the condition of the bond by paying over all the money in his hands to his ward upon the latter's arrival at full age, creates no trust for the benefit of the minor, but the mortgagees are the absolute owners of both the legal and the beneficial interest in the mortgage, and have the full right to treat it as their own.[2] The contrary has also been held.[3]

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[1] Commercial Warehouse Co. *v.* Graber, 45 N. Y. 393.

[2] Kunkel *v.* Fitzhugh, 22 Md. 567.

§ 167. **Creditor substituted to the Claim of his Debtor for Reimbursement upon the Party ultimately liable.** — A creditor may also be substituted to his debtor's claim for reimbursement upon one who is under no liability for the debt, where the latter is the party upon whom the burden of the debt ought ultimately to fall.[4] Thus, where an insurance policy had been properly assigned by the insured as security for a loan of money made to him by the assignee, but after a loss had occurred, the insured having failed and the insurance company having another claim upon a bottomry bond against the insured and a surety upon this bond, the company, being indemnified by the surety, retained the amount of this claim out of the loss upon the assigned policy instead of collecting it from the surety, the assignee of the policy was allowed in equity to be substituted to the claim of the company upon the surety, to the extent of the amount so retained by the company out of what was due to him upon the policy.[5] So, also, the placing of notes in the hands of an attorney as collateral security, to collect them, and to apply the proceeds upon a

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[1] Boyd *v.* Parker, 43 Md. 182.

[2] Miller *v.* Wack, 1 N. J. Eq. 204.

[3] Morrill *v.* Morrill, 53 Vt. 74.

[4] *Antea,* § 85, and cases there cited. According, Jones *v.* Johnson, 86 Ky. 530; Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514.

[5] Wiggin *v.* Dorr, 3 Sumner, C. C. 410.

be regarded as the principal debtor and the county as the surety, and that the bondholders were entitled to be substituted for the payment of their coupons to the benefit of the mortgage.[1] The security to the State or county was considered to be, not only for its own protection, but for the better securing of the bonds.[2] But where a corporation has conveyed lands to a State as a bare indemnity to the State against loss on the State's bonds issued to the corporation, the bondholders cannot, as against the State, compel the land to be applied to the payment of the bond, and the grantees of the State will take the land free from any claim of the bondholders.[3] The question (apart from any considerations of sovereignty) has been taken to be whether the railroad company or the State should be regarded as the principal debtor,[4] and whether the statutory lien was intended to be available for the benefit of the bondholders.[5] But where a town made a lawful appropriation to a railroad company and issued its bonds therefor to the company, the purchaser of these bonds from the company could not claim to have paid the appropriation by his purchase, and, the bonds being in default and having been held to be void in his suit against the town, was not subrogated to any right of the railroad company to enforce payment of the appropriation by the town: he was not a creditor either of the company or of the town; he had paid no debt of either, and had no right of subrogation against either as his debtor.[1]

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[1] Washington, Ohio & Western R. R. Co. *v.* Cazenove, 83 Va. 744.

[2] So in Tompkins *v.* Little Rock R. R. Co., 15 Fed. Rep. 6, 18; Hand *v.* Savannah & Charleston R. R. Co., 12 So. Car. 314; Gibbes *v.* Greenville & Columbia R. R. Co., 13 So. Car. 228; Forrest *v.* Luddington, 68 Ala. 1; Colt *v.* Barnes, 64 Ala. 108.

[3] Chamberlain *v.* St. Paul R. R. Co., 92 U. S. 299.

[4] Stevens *v.* Louisville & Nashville R. R. Co., 2 Flip. C. C. 715. See Railroad Cos. *v.* Schutte, 103 U. S. 118; Branch *v.* Macon R. R. Co., 2 Woods, 385; Young *v.* Montgomery R. R. Co., 2 *Id.* 606.

[5] Tompkins *v.* Little Rock R. R. Co., 125 U. S. 109; s. c., 21 Fed. Rep. 370, 18 *Id.* 344, and 5 McCrary, 597; Stevens *v.* Louisville R. R. Co., 3 Fed. Rep. 673; Cunningham *v.* Macon R. R. Co., 3 Woods, 418; Kelly *v.* Alabama & Cincinnati R. R. Co., 58 Ala. 489; Clews *v.* Bondholders, 54 Ga. 315.

§ 168. **Substitution to the Securities held by the Sureties in a Criminal Recognizance.** — The substitution of the creditor to the securities held by the sureties does not extend to the case of a recognizance taken in the course of criminal proceedings before the liability of the sureties has been fixed at law. Thus, where the principal in such a recognizance gave a trust-deed to his sureties therein, providing that if the recognizance should be forfeited and the sureties become liable thereon, the trust property should be applied to pay the recognizance so far as it would go, it was held that the State could not maintain a bill in equity to subject this property to the payment of the amount due upon the recognizance before obtaining judgment against the sureties.[2] The doctrine of subrogation does not apply in favor of sureties or bail to bonds taken in the course of criminal proceedings.[3]

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[1] Ætna Ins. Co. *v.* Middleport, 124 U. S. 534.

[2] People *v.* Skidmore, 17 Calif. 260.

[3] United States *v.* Ryder, 110 U. S. 729. An Indiana Case (Kane *v.* State, 78 Ind. 103) seems to be inconsistent with this, and also with the usual rule as to the rights of successive sureties. *Antea*, § 131 *et seq.*

CHAPTER IV.

SUBROGATION AMONG JOINT DEBTORS.

SECTION
Right of Joint Debtors to Subrogation as against each other . 169
Where one Joint Debtor has assumed the Ultimate Liability . 170
In Cases of Partnership . . . 171
Substitution of a Partnership Creditor to Security taken by a retiring Partner against the Firm Debts . . . . 171 *a*
Where Securities belonging to Different Owners are held for the Same Debt 172
Where Land of two or more Owners is subject to one Mortgage . 173
This Principle applied against one claiming under a Joint Purchaser 174
SECTION
Applied to Mortgagees whose Estate was subject to a Prior Lien 175
Not applied where Lien upon one Security extinguished . . . 176
Where the Ultimate Liability is upon one of Several Owners of Securities held for the Same Debt 177
These Principles applied to Joint Mortgagors and to the Grantees of a Mortgagor 178
Extent of the Right of Subrogation 179
Whether Original Obligation discharged as to all the Debtors upon Payment by one . . . 180

§ 169. **Right of Joint Debtors to Subrogation as against each other.** — The right of subrogation among parties severally bound as principals, has been denied;[1] but the usual rule is that one of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional shares of the indebtedness which he has discharged;[2] and this, as in other cases of subrogation, arises rather from natural justice than from contract.[3] Each joint debtor is regarded as the principal debtor for that

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[1] Clark *v.* Warren, 55 Ga. 575; Engles *v.* Engles, 4 Ark. 286; Benton *v.* Bailey, 50 Vt. 137.

[2] Ackerman's Appeal, 106 Penn. St. 1; Dobyns *v.* Rawley, 76 Va. 537; Baltimore & Ohio R. R. Co. *v.* Walker, 45 Ohio St. 577; Sumner *v.* Rhodes, 14 Conn. 135; Smith *v.* Latimer, 15 B. Mon. (Ky.) 75; Shropshire *v.* Creditors, 15 La. Ann. 705.

[3] Durbin *v.* Kuny, 19 Oreg. 71.

course hold all the debtors and all the securities that they have given, until he shall be fully satisfied.[1]

§ 170. **Where one Joint Debtor has assumed the Ultimate Liability.** — If, as between joint debtors, it has become the duty of one of them to pay the entire debt, the others, if they shall be compelled to pay it, will be subrogated to the securities and means of payment held by the creditor against the former, just as if they had been sureties of the former *eo nomine.*[2] Thus, if two of the three principal obligors in a bond put into the hands of the third the means to pay it, but he fails to do so, and a judgment recovered upon the bond against the three is paid by one of the two, the latter will be subrogated to the lien of the judgment upon the lands of the third in the hands of his grantees, to whom he has conveyed them since the judgment.[3] The same principle was applied in a case in which it appeared that the plaintiff and M., being partners, agreed that M. should pay the defendant for property which they had bought of him, and M. accordingly sent his note to the defendant, who declined to receive it as payment, and demanded and received the price of the property from the plaintiff. The plaintiff and the defendant then agreed that the defendant should still hold M.'s note, and conceal the plaintiff's payment, and should turn over to the plaintiff whatever M. might pay on the note. M. having afterwards made a payment on the note to the defendant, in ignorance of the plaintiff's payment, it was held that the plaintiff had by subrogation a right to all the securities held by the defendant, and that, M.'s note being such a security, the payment made thereon belonged to the plaintiff.[1] So if one of two joint debtors has given to their surety for the debt collateral security to protect him against his suretyship, and has then agreed with his co-debtor for a valuable consideration, himself to pay the whole debt, the other joint debtor, if he is afterwards compelled by the creditor to pay the debt, will be subrogated to the benefit of that security in the hands of the surety, whom he has discharged by his payment, in preference to the claims of the judgment-creditors of the debtor who should have paid the debt.[2] The same rules will be applied if the joint debtors are a husband and wife who have been divorced.[3] But the debtors cannot by any arrangement among themselves lessen the rights of the creditor against all or any of them; he may insist upon being paid in full, leaving them to adjust their own equities.[4] And even after full satisfaction of the creditor, as subrogation is an equity to be enforced only where it will benefit a meritorious claim without doing injustice to others,[5] it will be denied if the person claiming it has agreed for value to waive his right, or if he is indebted in a larger amount to the party against whom he seeks it.[6]

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[1] Hall *v.* Howard, 32 Ch. D. 430; Kramer *v.* Carter, 136 Mass. 504; Frost *v.* Frost, 3 Sandf. Ch. (N. Y.) 188; Hoye *v.* Penn, 2 Harr. & G. (Md.) 473; Manning *v.* Gasharie, 27 Ind. 399; Palmer *v.* Stacy, 44 Iowa 340; Garden *v.* Morrow, 8 Ala. 486; Schoenewald *v.* Dieden, 8 Ills. App. 389.

[2] Shinn *v.* Shinn, 91 Ills. 477; Wheeler's Estate, 1 Md. Ch. Dec. 80; Crafts *v.* Mott, 4 N. Y. 603; Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 618.

[3] Buchanan *v.* Clark, 10 Gratt. (Va.) 164.

§ 171. **In Cases of Partnership.** — A partner who, after the dissolution of the partnership, pays a firm debt out of his private property may in equity enforce contribution therefor from his co-partners,[7] by virtue of the partnership agreement to contribute to losses rather than by way of subrogation;[8] but he cannot claim any lien upon the separate estate of his partner in bankruptcy for the balance due to himself upon settlement of the partnership accounts, by subrogation to the rights of a firm-creditor who has been paid out of the firm property;[1] for partnership creditors have themselves no lien upon the firm property,[2] and can secure its application to their claims only through the rights of the partners.[3] The creditors of a partner who is entitled to be subrogated as against the firm will succeed to his rights;[4] and the legatee of a partner subject to the payment of his debts will occupy the same position.[5] If individual property of one of the partners of a bankrupt firm has been pledged for a firm debt, the creditor may, and if requested by separate creditors of that partner must, prove his whole debt against the firm assets, for the relief of that partner's separate estate, thus in effect subrogating that separate estate to the creditor's right against the firm.[6] The subrogation of one partner who has paid a firm debt to the position of the creditor as against his co-partners cannot ordinarily be enforced without a settlement of the partnership accounts.[7] Nor can the bail of one

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[1] Field *v.* Hamilton, 45 Vt. 35.

[2] Butler *v.* Birkey, 13 Ohio St. 514.

[3] Stevens *v.* Goodenough, 26 Vt. 676.

[4] Jackson *v.* Roberts, 83 Ga. 358; Hards *v.* Burton, 79 Ills. 504; Buettel *v.* Harmount, 46 Minn. 481.

[5] *Antea*, § 4.

[6] Greenlaw *v.* Pettit, 87 Tenn. 468.

[7] Downs *v.* Jackson, 33 Ills. 464; Eakin *v.* Knox, 6 So. Car. (Rich.) 14.

[8] Phillips *v.* Blatchford, 137 Mass. 510; Hogan *v.* Reynolds, 21 Ala. 56; Bartlett *v.* McRea, 4 Ala. 688. *Contra*, Sells *v.* Hubbell, 2 Johns. Ch. (N. Y.) 394, 397.

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[1] *In re* Smith, 16 N. B. R. 113; Singizer's Appeal, 28 Penn St. 524.

[2] Case *v.* Beauregard, 1 Woods, C. C. 125; s. c. 99 U. S. 119; Allen *v.* Centre Valley Co., 21 Conn. 130; Sigler *v.* Knox County Bank, 8 Ohio St. 511; Gwin *v.* Selby, 5 Ohio St. 96; Mayer *v.* Clark, 40 Ala. 259; Reese *v.* Bradford, 13 Ala. 837.

[3] Couchman *v.* Maupin, 78 Ky. 33; O'Bannon *v.* Miller, 4 Bush (Ky.), 25; Black *v.* Bush, 7 B. Mon. (Ky.) 210; Guyton *v.* Flack, 7 Md. 398; Schmidtapp *v.* Currie, 55 Miss. 597; Hawk Eye Woollen Mills *v.* Conklin, 26 Iowa, 422; Waterman *v.* Hunt, 2 R. I. 298.

[4] Matter of Swayne, 1 Clark (Penn.), 57; Foot, *in re*, 12 N. B. R. 337; Royalton Bank *v.* Cushing, 53 Vt. 321.

[5] Hill *v.* Huston, 15 Gratt. (Va.) 350.

[6] Collie, *in re*, 3 Ch. D. 481; Bowden, *ex parte*, 1 Deac. & Ch. 135; Plummer, *in re*, 1 Phillips, 56; Rolfe *v.* Flower, L. R. 1 P. C. 27; English & American Bank, *ex parte*, L. R. 4 Ch. 49; Holbrook, *in re*, 2 Lowell, 259; Thomas, *in re*, 8 Biss. 139; May, *in re*, 17 N. B. R. 192; Besley *v.* Lawrence, 11 Paige (N. Y.), 581; Wilder *v.* Keeler, 3 *Id.* 167.

[7] Bittner *v.* Hartman, 139 Penn. St. 632; Fessler *v.* Hickernell, 82 Penn. St. 150; Baily *v.* Brownfield, 20 Penn. St. 41; Shattuck *v.* Lawson, 10 Gray (Mass.), 405; Le Page *v.* McCrea, 1 Wend. (N. Y.) 164; Barhydt *v.* Perry, 57 Iowa, 416; Lyons *v.* Murray, 95 Mo. 23; McDonald *v.* Holmes, 29 Pac. Rep. 735.

The Court of Appeals of the State of New York and the Supreme Courts of Pennsylvania and Arkansas have refused to allow the creditor of a partnership to maintain an action upon a bond given to a retiring partner by the remaining members of the firm to secure him against his liability for the partnership debts, upon the manifest ground that the bond was given, not at all for the benefit of the firm creditors, but solely for the protection of the retiring partner;[1] but if the bond is conditioned both for the relief of the retiring partner and for the payment of the outstanding firm debts, it has been considered to be more than a mere contract of indemnity, and both the obligee of the bond and the firm creditors themselves have been allowed to proceed upon it to enforce payment of the firm debts.[2] The remaining partners, by their agreement to appropriate the firm property to the payment of the firm debts, have been held to become trustees for the creditors,[3] and will be held by a court of equity to the proper discharge of the trust.[4] The same principle will be applied to the deposit by the retiring partner of a sum of money with the new firm which, by agreement between him and the members of the new firm, is to be applied to his share of the liabilities of the old firm; it becomes a trust fund for the creditors of the old firm, and their rights will not be affected by any subsequent equities that may arise in favor of the members of the new firm.[1] But a promise by the members of the new firm to the retiring partner, upon their taking merely the assets of the old firm, to pay its debts, though it has been held to give the old creditors a direct right of action against these new members,[2] or others who have made it,[3] under the liberal doctrine that one for whose benefit a promise is made may enforce it, though not a party to it or privy to the consideration,[4] yet gives the retiring partner no lien upon these assets for the enforcement of the promise,[5] and gives the firm creditors no lien upon the assets which can be enforced against third persons to whose hands these assets come without notice of any trust,[6] and no special rights, it is sometimes held, against the remaining partners personally,[7] or against the assets in the hands of the latter,[8] even though the firm and all the partners were insolvent when the promise was made.[9] The right of partnership creditors to hold the partnership property doubtless arises by way of subrogation to the right of the partners to have the firm property applied to the payment of the firm debts;[1] but these rights are now a part of the law of partnership rather than of subrogation.

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[1] Merrill *v.* Green, 55 N. Y. 270; Mackintosh *v.* Fatman, 38 How. Pr. (N. Y.) 145; Serviss *v.* McDonell, 107 N. Y. 260; Berry *v.* Brown, 1 Silvernail's N. Y. Ct. Appeals, 542; Campbell *v.* Lacock, 40 Penn. St. 448; Hicks *v.* Wyatt, 23 Ark. 55.

[2] Hood *v.* Spencer, 4 McLean, C. C. 168; Collier, *in re*, 12 N. B. R. 266; Claflin *v.* Ostrom, 54 N. Y. 581, 584; Barlow *v.* Myers, 3 Hun (N. Y.), 720, and 6 Thomp. & C. (N. Y.) 183; Wilson *v.* Stilwell, 14 Ohio St. 464; Ingles *v.* Walker, 37 Ga. 256; Dunlap *v.* McNeil, 35 Ind. 316; Devol *v.* McIntosh, 23 Ind. 529; Francis *v.* Smith, 1 Duv. (Ky.) 121; Garvin *v.* Mobley, 1 Bush (Ky.), 48; Meyer *v.* Lowell, 44 Mo. 328; Poole *v.* Hintrager, 60 Iowa, 180; Kimball *v.* Noyes, 17 Wisc. 695; Sanders *v.* Clason, 13 Minn. 379. See further Arnold *v.* Nichols, 64 N. Y. 117; Floyd *v.* Ort, 20 Kans. 162. Similar doctrines are maintained in Rice *v.* Savery, 22 Iowa, 470; Wiggins *v.* McDonald, 18 Calif. 126; Allen *v.* Thomas, 3 Met. (Ky.) 198; Hall *v.* Roberts, 61 Barb. (N. Y.) 33. Most of these decisions were made in States in which the distinction between law and equity has been abolished, and the real party in interest allowed to sue in his own name.

[3] Gorham, *in re*, 9 Biss. 23; Marsh *v.* Bennett, 5 McLean, 117; Wildes *v.* Chapman, 4 Edwards, Ch. (N. Y.) 669.

[4] Sedan *v.* Williams, 4 McLean, 51; Wilson *v.* Soper, 13 B. Mon. (Ky.) 411; Phelps *v.* McNeely, 66 Mo. 554; Baer *v.* Wilkinson, 35 W. Va. 422; Conroy *v.* Woods, 13 Calif. 626.

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[1] Fries v. Ennis, 132 Penn. St. 195.

[2] Bellas v. Fagely, 19 Penn. St. 273; Weaver v. White, 19 N. Y. Supt. 616.

[3] Goldman v. Biddle, 118 Ind. 492; Maxfield v. Schwartz, 43 Minn. 221; Lehow v. Simonton, 3 Color. 346.

[4] *Antea*, § 85.

[5] Griffith v. Buck, 13 Md. 102; Goembel v. Arnett, 100 Ills. 34; Andrews v. Mann, 31 Miss. 322; Commercial Bank v. Lewis, 13 Sm. & M. (Miss.) 226.

[6] Fulton v. Hughes, 63 Miss. 61; Hapgood v. Cornwell, 48 Ills. 64.

[7] Wild v. Dean, 3 Allen (Mass.), 579; Fowle v. Torrey, 131 Mass. 29.

[8] Robb v. Mudge, 14 Gray (Mass.), 534; Richardson v. Tobey, 3 Allen (Mass.), 81.

[9] Howe v. Lawrence, 9 Cush. (Mass.) 553; Robb v. Mudge, 14 Gray (Mass.), 534.

§ 172. **Where Securities belonging to Different Owners are held for the Same Debt.**— Where securities belonging to several different persons are held together to secure the payment of a single debt, they should be applied *pari passu* to the satisfaction of the creditor, so that each of the several owners of the securities may contribute his just proportion of the common burden;[2] and if such creditor satisfies the demand out of the securities of only one of the owners, leaving the other securities undisturbed, equity will so dispose of these others as to throw the burden of the debt upon all in reasonable proportions.[3] The one whose property has paid the whole debt will, to the extent of his actual payment, be subrogated to the rights of the creditor against the others, and may hold their securities to enforce the payment by them of such sums as they ought in equity to contribute.[4] If the security is a mortgage, and the whole debt is paid to save the estate of the party paying it, by one of two tenants in common who have, since the giving of the mortgage, acquired the equity of redemption, the assignment of the mortgage to this cotenant will not extinguish its claim in favor of the other, who has paid nothing.[5] That share of the mortgage-debt which it belonged to such an assignee to pay is extinguished;

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[1] Manchester Bank, *ex parte*, 12 Ch. D. 917; Wiley, *in re*, 4 Biss. C. C. 214; Rice *v.* Barnard, 20 Vt. 479; Washburn *v.* Bank of Bellows Falls, 19 Vt. 278; Richardson *v.* Tobey, 3 Allen (Mass.), 81; Howe *v.* Lawrence, 9 Cush. (Mass.) 553; Waterman *v.* Hunt, 2 R. I. 298; Fargo *v.* Ames, 45 Iowa, 491; Schmidlapp *v.* Curry, 55 Miss. 597; Grabenheimer *v.* Rindskopf, 64 Tex. 49.

[2] Wright, *in re*, 16 Fed. Rep. 482; Hoyt *v.* Doughty, 4 Sandf. (N. Y.) 462; Paine *v.* Bonney, 4 E. D. Smith (N. Y.), 734; s. c., 6 Abbott Pr. (N. Y.) 99, 101; Semmes *v.* Boykin, 27 Ga. 47. So in admiralty, The Dewthorpe, 2 Notes of Cas. 264; The Constantia, 4 *Id.* 512.

[3] Gould *v.* Central Trust Co., 6 Abbott New Cas. (N. Y.) 381; McCready *v.* Van Antwerp, 24 Hun (N. Y.), 322.

[4] Aiken *v.* Gale, 37 N. H. 501; Dowdy *v.* Blake, 50 Ark. 205; Beck *v.* Tarrant, 61 Tex. 402.

[5] Barker *v.* Flood, 103 Mass. 474; Calkins *v.* Steinbach, 66 Calif. 117.

§ 173. **Where Land of two or more Owners is subject to one Mortgage.** — Where one of the owners of land subject to a mortgage pays off the mortgage-debt by instalments, and upon making the last payment takes an assignment of the mortgage, its lien is not thereby extinguished in favor of the other owners.[1] Either one of such owners, whether they hold distinct parcels of the incumbered estate, or are tenants in common of the whole, is at liberty to redeem for the protection of his estate; and upon so redeeming he becomes subrogated to the rights of the mortgagee, and may hold the land as if the mortgage subsisted,[2] until the other owners reimburse him their proportions of the incumbrance; and in the absence of any agreement their proportions will be according to the proportionate value of their respective interests.[3] The grantee of such an owner will have the same right of subrogation as was possessed by his grantor.[4] Where two purchasers of land gave their joint notes for the purchase-money thereof, secured by a mortgage of the premises, and after a partition of the premises one of them refused to pay his proportion of the last note, so that the other was compelled to redeem the whole mortgage, the latter was allowed to hold the land of the defaulter for the amount which he had thus been compelled to pay above his own share of the note,[5] and to have the same interest as had been agreed to be paid upon the original debt.[6] Upon the same principle, the assignee of a mortgage which covered three estates, having purchased two of these estates, can recover from the third estate only its ratable proportion of the mortgage-debt.[7]

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[1] Duncan *v.* Drury, 9 Penn. St. 332.

[2] Newbold *v.* Smart, 67 Ala. 326; Lowery *v.* Byers, 80 Ind. 443; Carter *v.* Penn, 99 Ills. 390; Brooks *v.* Harwood, 8 Pick. (Mass.) 497.

[3] Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402; Sawyer *v.* Lyon, 10 Johns. (N. Y.) 32; Aiken *v.* Gale, 37 N. H. 501.

[4] Watson's Appeal, 90 Penn. St. 426.

[5] Fisher *v.* Dillon, 62 Ills. 379.

[6] Simpson *v.* Gardiner, 97 Ills. 237.

[7] Colton *v.* Colton, 3 Phila. 24.

§ 174. **This Principle applied against one claiming under a Joint Purchaser.** — One Pierson and four others purchased a lot of land, and gave for the purchase-money their joint note secured by a mortgage upon the lot. They then divided the lot among themselves into four equal parts, one of which was allotted to Pierson, and agreed to give each other quitclaim deeds of their respective parts. Pierson took possession of his part, built a house upon it, and then sold it to one Williams, who paid him therefor in full. The title still remaining in all the purchasers, they joined in conveying to him the parcel purchased by him of Pierson. Pierson paid nothing of the original purchase-money, of which he should have paid one-fourth; the remaining three-fourths were paid by the other purchasers. The mortgagee then filed a bill to foreclose his mortgage for the unpaid fourth part of the purchase-money; and it was decreed that the part of the lot set off to Pierson and conveyed to Williams should be first sold, *Judge Davison* saying, "The several owners of the residue of the lot having each paid one-fourth of the purchase-money, the remaining fourth was in equity the debt of Pierson; and as his debt it was properly chargeable on the property set off to him."[1] It was not pretended in this case that Williams had notice that Pierson had not paid his share of the purchase-money; but, having notice of the mortgage, he was to be regarded as having purchased subject to the equities that arose under it. But under somewhat similar circumstances in Georgia it was held that one purchaser who had been compelled to pay the whole of the purchase-money was not to be subrogated for his reimbursement to the mortgage-lien upon the share of the other purchaser in the hands of a grantee from the latter, although such grantee had constructive notice of the mortgage from the fact of its being recorded.[2]

§ 175. **Applied to Mortgagees whose Estate was subject to a Prior Lien.** — Where three junior mortgagees of land, having no priority among themselves, had agreed with the mortgagor, that if it should be necessary to redeem from the prior mortgage each of these three junior mortgagees should pay one-third of the amount due thereon, and be indemnified therefor out of the property, and one of the three paid one-third of the amount due upon the prior mortgage, and then advanced the remaining amount and took an assignment of that mortgage, it was held that as to the remaining two-thirds he became subrogated to the rights of the prior mortgagee, and might require his co-mortgagees to redeem by paying to him those two-thirds, or to forfeit all title to the mortgaged premises.[1]

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[1] Williams *v.* Perry, 20 Ind. 437.

[2] Clark *v.* Warren, 55 Ga. 575.

§ 176. **Not applied where Lien upon one Security extinguished.** — If two securities are held for the payment of a debt, and the lien upon one of them has been lost by lapse of time, the owner of the other security, upon paying the debt, will acquire no right of subrogation to that which has been thus discharged.[2] A testator devised a tract of land to his two sons, Benjamin and Thomas. The purchase-money due from the testator for this land being unpaid, the testator's vendor brought his bill against the executors, and obtained a decree charging the land with its payment. By a subsequent decree, the land was ordered to be sold therefor. While these decrees remained unexecuted, Benjamin sold his portion of the land; and the purchaser thereof took and held possession until, by the lapse of time, he acquired a title which was valid against these decrees. Then the decrees were revived; and by order of the court the remaining portion of the land, being the share of Thomas, was sold for the payment of the testator's indebtedness for the price of the whole tract. On a bill brought by Thomas against Benjamin for contribution it was held that, as the vendor's lien upon the whole tract

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[1] Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402.

[2] See *antea,* § 110. Doughty *v.* Bacot, 2 Desaus. Eq. (So. Car.) 546; Lovell *v.* Nelson, 11 Allen (Mass.), 101.

respective rights of the parties, will be in no better position than his grantor;[1] he must pay the whole debt, even though his co-debtors should convey the other incumbered property to the common creditor.[2] And in such a case a court of equity may order the properties or interests which the creditor holds for the security of his debt to be sold in the succession or in the proportion in which they are, among themselves, liable for its payment;[3] thus, where the joint purchasers of land, having given back a mortgage for its price, made partition of it among themselves, and one of them paid his proportion of the mortgage debt, it was held that the court might properly order the share of the other purchaser to be first sold on a foreclosure of the mortgage.[4] And although, where a bill to redeem from a mortgage is filed by several persons as owners in different proportions of the equity of redemption, the proceedings of the mortgagee to enforce his security will not be delayed until the complainants have settled the proportions in which they are respectively to contribute to the redemption,[5] yet, if they pay into court the full amount which is due to the mortgagee, the suit may be delayed for a reasonable time to enable them to proceed against another defendant, who is also interested in the equity of redemption, for the purpose of compelling him to contribute his proportion of the mortgage-debt.[6]

§ 178. **These Principles applied to Joint Mortgagors and to the Grantees of a Mortgagor.** — C. and S. purchased a lot of land, and gave their joint note and mortgage for the price thereof. C. afterwards conveyed his undivided half to S., subject to the mortgage, which S. assumed and agreed to pay, and gave to C. a bond of indemnity against the same. S. subsequently conveyed the lot to a grantee with full covenants of warranty and against incumbrances, and then became insolvent and left the State, having failed to pay the mortgage-debt. The mortgagee having brought a suit against C. on the note, instead of proceeding against the land, C. thereupon tendered to the mortgagee the full amount due, and demanded an assignment of the note and mortgage to a third person for his benefit, so that he might enforce them against the land for his indemnity; but the mortgagee refused to make such an assignment. It was held, on a bill in equity then brought by C. against the mortgagee and the grantee of S., that the arrangement between C. and S. and the conveyance from the former to the latter constituted in equity the relation of principal and surety, not only between themselves personally, but also with reference to their interests in the mortgaged property; that the equitable rights of C. and S. were now the same as if S. had originally owned the whole lot, and had given the mortgage for his own debt, and C. had been merely his surety; that accordingly the land was the primary fund for the payment of the debt, and the surety, if compelled by the mortgagee to pay the debt, would be entitled to be subrogated to the charge of the mortgage upon the land; and that C.'s rights were not affected by the fact that he had taken a bond of indemnity from S., for, as S. was insolvent, his sureties on that bond might well insist that the land should be first resorted to for the payment of the mortgage-debt, instead of its being collected from C., and their liability to him upon the bond thus becoming fixed.[1] The owner of land mortgaged it, and subsequently sold a part of it to a purchaser who assumed the mortgage, but failed to pay it, and conveyed the land he had purchased to B., who had notice of the facts. In the mean time, the mortgagor had conveyed another portion of the mortgaged premises to C., who conveyed it with warranty to another purchaser; and, the mortgage being still unpaid, this last purchaser, to relieve his estate, applied to its discharge a portion of the purchase-money which he would otherwise have paid to C. B. being still indebted to his vendor for the price of his land in a sum greater than had been paid for the discharge of the mortgage, it was held that C., having in effect, through the payment made by his grantee, redeemed from the mortgage, was entitled for his reimbursement to be subrogated to its lien upon the land of B., which should have discharged it.[1] So when the amount due upon a purchase of two separate lots has been apportioned between the two purchasers of each lot, and the purchaser of one lot has paid his share of the debt, the other lot should be sold first upon foreclosure of the mortgage for the balance due thereon, as against a subsequent purchaser of that lot whose deed was made subject to all existing mortgages.[2]

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[1] Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 618; Crafts *v.* Crafts, 13 Gray (Mass.), 360; Cook *v.* Hinsdale, 4 Cush. (Mass.) 134.

[2] Crafts *v.* Crafts, 13 Gray (Mass.), 360.

[3] Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Williams *v.* Perry, 20 Ind. 437.

[4] Roddy's Appeal, 72 Penn. St. 98.

[5] *Antea*, § 170. Weihl *v.* Atlanta Furniture Co., 15 So. E. Rep. 282.

[6] Brinckerhoff *v.* Lansing, 4 Johns. Ch. (N. Y.) 65.

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[1] Cherry *v.* Monro, 2 Barb. Ch. (N. Y.) 618.

§ 179. **Extent of the Right of Subrogation.** — This right of subrogation is paramount to any other claim or lien upon the property against which it is sought to be exercised, if such other claim or lien was subject to the obligation which has been discharged by one debtor, or to the satisfaction of which his property has contributed more than its equitable share;[3] but it cannot take place beyond the amount actually paid under a legal liability,[4] or under compulsion,[5] by or from the property of the one who seeks to enforce it, nor beyond the proportional share of those who are, either personally or by a pledge or mortgage of their property, jointly liable with him.[6] He cannot be subrogated upon the payment of any-

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[1] Rardin *v.* Walpole, 38 Ind. 146.

[2] Weyant *v.* Murphy, 78 Calif. 278.

[3] Silk *v.* Eyre, Irish Rep. 9 Eu. 393; Duncan *v.* Drury, 9 Penn. St. 332.

[4] Walker *v.* Municipality No. One, 5 La. Ann. 10.

[5] As where a husband pays his own debt out of his wife's property. Greiner *v.* Greiner, 58 Calif. 115; Pease *v.* Egan, 131 N. Y. 262.

[6] Shropshire *v.* Creditors, 15 La. Ann. 705.

a debt by one of several joint debtors inures to the benefit of all of them.[1] If the principal obligation is held to be extinguished upon its payment by one of the debtors, it cannot be kept alive by being assigned to a stranger who has paid it with money furnished to him for that purpose by one of the debtors.[2] But if the assignment was made to the stranger by contemporaneous agreement to secure him for advancing money to take up the indebtedness, though at the request of one who is liable for the debt, such an assignment will not extinguish the original obligation.[3]

Y.) 228; Boykin *v.* Buie, 109 Nor. Car. 501; Adams *v.* Keeler, 30 Ga. 86; Maxwell *v.* Owen, 7 Coldw. (Tenn.) 630; Baldwin *v.* Merrill, 8 Humph. (Tenn.) 132; Tompkins *v.* Fifth National Bank, 53 Ills. 57; Planters' Bank *v.* Spencer, 3 Sm. & M. (Miss.) 305.

[1] As in French *v.* Edwards, 5 Sawyer, C. C. 266; Booth *v.* Farmers' Bank, 11 Hun (N. Y.), 258; Allison *v.* Pattison, 11 So. Rep. 194; James *v.* Yaeger, 86 Calif. 184; Fort Worth Bank *v.* Daugherty, 81 Tex. 301; Boos *v.* Morgan, 30 No. E. Rep. 141.

[2] Hogan *v.* Reynolds, 21 Ala. 56.

[3] McIntyre *v.* Miller, 13 M. & W. 725.

CHAPTER V.

SUBROGATION AMONG PARTIES TO BILLS AND NOTES.

SECTION

An Indorser upon Payment subrogated to Rights of Holder against Prior Parties 181
The Maker of a note not entitled to the benefit of Payments made by Indorsers 182
Indorser or Accommodation Maker of Note regarded as Surety merely . . . . 182 *a*
Transferee of *Bona Fide* Holder substituted to his Rights, though himself chargeable with Equities 183
Acceptor of Bill *supra protest* substituted to Rights of Holder from whom he takes it . . . 184
Transferees of Notes or Bills entitled to the Benefit of Security held for their payment . . . 185
Rights of a Stranger upon taking up a Note 186
Holder of Note substituted to the Benefit of Mortgage given by one to another party to the Note to secure its payment 187
Substitution of Holder to the Benefit of Indemnity held by an Indorser 188
Bill drawn against a Consignment of Merchandise and made a Lien upon it 189
Rights of Indorsee of Bill of Exchange with fraudulent Bill of Lading attached . . . . . 189 *a*
Securities held by a Banker against his Acceptances available to their Holders 190
This Principle extends to all Parties to the Paper . . . 191
Property in Security deposited by Drawer with Acceptor . . . 192
Holder not substituted to Security held by one under no Liability, unless actually appropriated 193
Right of Holders to Securities held by Acceptor not a Paramount one 194
Holder's Right to control Securities given by Drawer to Acceptor no greater than Drawer's . . 195
Holder's Right to Application of Security perishes with that of its Depositor 196
Taking Bill on the Credit of the Funds is not enough 197
Extent of Holder's Right of Substitution to Acceptor's Securities 198
Rights of Acceptor to Securities held against the Bill by Prior Parties thereto 199
Acceptor's Securities to be applied upon all Acceptances alike . . 200
Subrogation of Holder of Check to Rights of Drawer . . . . . 200 *a*
Whether Suits or Judgments extinguished upon Payment by Parties secondarily liable . . 201

§ 181. **An Indorser upon Payment subrogated to Rights of Holder against Prior Parties.** — The payment of a note or bill by an indorser to the holder thereof will not extinguish the instrument; but the indorser, after his payment, whether made voluntarily or upon compulsion, if he was liable for it, will be subrogated to all the remedies that are available upon the note or bill against the antecedent parties thereto,[1] including the right of action against a bank which has by its negligence caused the release of a prior indorser.[2] A partial payment by an indorser will not extinguish *pro tanto* the liability of antecedent parties, unless it was made in their behalf and not by reason of the liability of the party making the payment to the holder;[3] the holder of the note can still collect the full amount thereof from the parties who are antecedently liable thereon, receiving the amount of such partial payment as a trustee for the indorser who originally made it,[4] unless the ultimate liability to pay the note rests upon this indorser as between himself and the other parties to the note, in which case the payment made by him will accrue to their benefit.[5] So the holder of a note, after receiving payment thereof from the indorser, may maintain an action thereon at the request and for the benefit of the indorser against the maker; and the latter cannot set up the indorser's payment as a defence to the action against himself.[6] The indorser of a promissory note, after its maturity and after his liability upon it has become fixed, does not cease to be entitled to the rights of a surety and become a joint principal debtor by joining with the maker of the note in a bond giving further time for its payment, although the bond does not describe him as a surety.[7] It has been

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[1] Woodward *v.* Pell, L. R. 4 Q. B. 55; Picquet *v.* Curtis, 1 Sumner, 478; Rushworth *v.* Moore, 36 N. H. 188; Parker *v.* Sanborn, 7 Gray (Mass.), 191; Cassebeer *v.* Kalbfleisch, 11 Hun (N. Y.), 120; Beckwith *v.* Webber, 78 Mich. 390; Seixas *v.* Gonsoulin, 40 La. Ann. 351; Crawford *v.* Logan, 97 Ills. 396. See also Pollard *v.* Ogden, 2 El. & Bl. 459; Pacific Bank *v.* Mitchell, 9 Met. (Mass.) 297; Dougherty *v.* Deeny, 45 Iowa, 443.

[2] Bird *v.* Louisiana Bank, 93 U. S. 96.

[3] Randall *v.* Moon, 12 C. B. 261; Jones *v.* Broadhurst, 9 C. B. 173; North National Bank *v.* Hamlin, 125 Mass. 506.

[4] Madison Square Bank *v.* Pierce, 62 Hun (N. Y.), 493; s. c., 17 N. Y. Supt. 270.

[5] Cook *v.* Lister, 13 C. B. N. S. 543.

[6] Williams *v.* James, 15 Q. B. 498; Bank of America *v.* Senior, 11 R. I. 376.

[7] Merriken *v.* Godwin, 2 Del. Ch. 236.

obtained the whole of his debt with interest. It is likewise the general rule, that what he has received from one party, or from dividends in bankruptcy of one party to the note, are payments which he must give credit for if he afterwards proves against others.[1] I am of opinion that this latter rule must be confined to cases in which the payment has been made by the person primarily liable on the note or bill. . . . The better opinion at common law is that payment by a drawer or indorser does not exonerate the acceptor or maker, unless the promise of the latter was for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment, or unless he has made it at the request or for the benefit of the acceptor or maker.[2] If this be not the rule at law, still I consider it to be so in bankruptcy. . . . A creditor may prove the debt, notwithstanding payment in whole or in part by a surety, because he in fact proves as trustee for the surety."[3] "On the other hand, a partial payment of a bill by any party to it inures to the benefit and is a discharge *pro tanto* of the liability of all subsequent parties.[4] Consequently any payment or dividend received by the holder from a prior party before proof in bankruptcy against a subsequent party must be deducted from the amount of the claim provable against the latter."[5]

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[1] Sohier *v.* Loring, 6 Cush. (Mass.) 537; Wildman, *ex parte*, 1 Atk. 109; Royal Bank, *ex parte*, 2 Rose, 197; Taylor, *ex parte*, 1 De G. & J. 302.

[2] Byles on Bills (10th ed.), 221, and cases there cited.

[3] Souther, *in re*, Talcott, *ex parte*, 2 Lowell, 320. Professor Ames (1 Cases on Bills & Notes, 880) cites as agreeing with this case De Tastet, *ex parte*, 1 Rose, 10; Ellerhorst, *in re*, 5 N. B. R. 144; Harris, *ex parte*, 2 Lowell, 568, and says that Cooper *v.* Pepys, 1 Atk. 106; Leers, *ex parte*, 6 Ves. 644; Worrall, *ex parte*, 1 Cox, 309; Taylor, *ex parte*, 1 De G. & J. 302; Oriental Bank, *in re*, L. R. 6 Eq. 582; and Howard, *in re*, 4 N. B. R. 571, *contra*, are not to be supported.

[4] See accordingly Pulsifer, *in re*, 9 Biss. 487; Lowell *v.* French, 54 Vt. 193; Dearth *v.* Hide & Leather Bank, 100 Mass. 540; Nash *v.* Burchard, 87 Mich. 85.

[5] 1 Ames's Cases on Bills & Notes, 880, citing Ryswick, *ex parte*, 2 P. Wms. 89; Wyldman, *ex parte*, 2 Ves.

§ 182 *a*. **Indorser or Accommodation Maker of Note regarded as Surety merely.** — An indorser of a note or bill, or one who has to the knowledge of the holder thereof become a party thereto merely for the accommodation of the maker or primary debtor thereon, is to be regarded merely as a surety of the primary debtor;[1] and has all the rights of a surety.[2] But parties who have exchanged notes with each other cannot claim to be accommodation makers or to have the rights of sureties.[3] The indorser's right of subrogation will not accrue until he has paid the note;[4] but it has been held that an indorser of notes secured by a deed of trust who has been compelled to pay the interest thereon acquires by his payment an interest in the security which is complete against the debtor, and awaits only the full satisfaction of the creditor to become complete as against all parties; so that upon a subsequent foreclosure by the creditor the indorser may have a decree for the interest so paid against the original debtor.[5] One who makes a promissory note for the accommodation of another has the same rights against the holder of the note who has notice of the facts as any surety for the debt.[6] Such a surety has the same right to be subrogated to the benefit of any collateral security held by the creditor or holder of the note,[7] and the same equitable right to be discharged by the creditor's surrender of any collateral security or impairment of the right of recourse against the principal

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Sen. 115; s. c. 1 Atk. 109; Royal Bank, *ex parte*, 2 Rose, 197; Weeks, *in re*, 13 N. B. R. 263; Sohier *v.* Loring, 6 Cush. (Mass.) 537; Blake *v.* Ames, 8 Allen (Mass.), 318; National Bank *v.* Porter, 122 Mass. 308.

[1] Story on Prom. Notes, § 412 *et seq.* Okie *v.* Spencer, 2 Wharton (Penn.), 253; Pease *v.* Tilt, 9 Daly (N. Y.), 229. But a statute increasing the rights of a surety will not necessarily extend to an indorser. Dibrell *v.* Dandridge, 51 Miss. 55, extended in Yates *v.* Mead, 68 Miss. 787.

[2] Hoffman *v.* Butler, 105 Ind. 371; Gunnis *v.* Weigley, 114 Penn. St. 191.

[3] Smith's Appeal, 125 Penn. St. 404; Stickney *v.* Mohler, 19 Md. 490.

[4] Malone Bank *v.* Shields, 55 Hun (N. Y.), 274.

[5] Telford *v.* Garrels, 132 Ills. 550.

[6] Guild *v.* Butler, 127 Mass. 386.

[7] Hagey *v.* Hill, 75 Penn. St. 108; Mayhew *v.* Boyd, 5 Md. 102.

debtor,[1] as would be possessed by a surety *eo nomine*,[2] though this has been denied in two old cases.[3] Thus, if a mortgagee, when one instalment of the mortgage-debt has become payable, so conducts himself as to operate a release of the mortgage, this will release the indorsers of notes which had been given for subsequent instalments of the mortgage-debt.[4] But, as would be the case with any surety,[5] if the indorser has himself assumed the burden of the debt as his own, then, as he would not be entitled to take the security by subrogation, he cannot complain of its release by the creditor.[6] And the right of an accommodation maker to demand the privileges of a surety against the holder depends upon the holder's knowledge of the relations between the parties to the note.[7] The apparent principal has not the rights of a surety against the creditor unless the real facts were known to the creditor.[8] So an accommodation indorser, on taking up the bill, may hold an accommodation acceptor, but not a subsequent indorser.[9]

§ 183. **Transferee of Bona Fide Holder substituted to his Rights though himself chargeable with Equities.** — One who takes a bill or note from a *bona fide* holder for value thereof will be substituted to all the rights of such holder, although he himself takes it overdue, or with notice of facts which would otherwise constitute a defence to the note or bill in his hands,[10] on

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[1] Guild *v.* Butler, *supra;* Nassau Bank *v.* Campbell, 63 Hun (N. Y.), 229; Dunn *v.* Parsons, 40 Hun, 77; Newcomb *v.* Raynor, 21 Wend. (N. Y.) 108; German Bank *v.* Fourhaw, 138 Penn. St. 474; Bridgman *v.* Johnson, 44 Mich. 491; Hillegas *v.* Stephenson, 75 Mo. 118; Union Bank *v.* Cooley, 27 La. Ann. 202.

[2] Case *v.* Hawkins, 53 Miss. 702; Capital Savings Bank *v.* Reel, 62 Calif. 419.

[3] Hurd *v.* Little, 12 Mass. 502; Liggett *v.* Pennsylvania Bank, 7 Serg. & R. (Penn.) 218.

[4] Bridgman *v.* Johnson, 44 Mich. 491.

[5] *Antea*, § 112.

[6] Sieger *v.* Second National Bank, 132 Penn. St. 308.

[7] Tyler *v.* Busey, 3 McArthur (D. C.), 344.

[8] Harrison *v.* Courtauld, 3 B. & Ad. 36; Auburn Bank *v.* Marshall, 73 Maine, 79; Goodman *v.* Litaker, 84 Nor. Car. 8.

[9] Gillespie *v.* Campbell, 39 Fed. Rep. 724.

[10] Carruthers *v.* West, 11 Q. B. 143; Fairclough *v.* Pavia, 9 Exch. 690;

§ 184. **Acceptor of Bill supra protest substituted to Rights of Holder from whom he takes it.** — The acceptor of a bill *supra protest* for the honor of a particular party to the bill succeeds to the rights of the party from whom he takes it, except that he discharges all the parties to the bill subsequent to the one for whose honor he takes it up, and that he cannot indorse it over.[1] Accordingly he can recover on the bill against any prior parties thereto who could have been held by the person from whom he receives it, or by any prior holder of the bill, even though they could not have been held by the one for whose honor such acceptor has taken up the bill.[2] As the acceptor *supra protest* is liable like an indorser,[3] so, when he takes up the bill upon such an acceptance, he is entitled to hold antecedent parties as an indorser could do.[4]

§ 185. **Transferees of Notes or Bills entitled to the Benefit of Security held for their Payment.** — The right to enforce security given for the payment of a note will pass to the indorsees or transferees of the note, even though the security itself has not been formally transferred or delivered to them.[5] A mortgagee's indorsement and delivery of the notes secured by the mortgage will operate as an equitable assignment of the mortgage itself.[1] The holder of the legal title to the security will be considered to hold it as a trustee for the benefit of the indorsees.[2] When the purchaser of a melodeon gave his note for the price thereof, with the agreement that the property should not vest in him until his payment of the note, it was held that the vendors' interest in the melodeon was merely an incident to the note, as in the case of a mortgage or pledge, and that it passed to one to whom they indorsed the note, so that trover for the melodeon could not afterwards be maintained in the name of the vendors.[3] And after a *bona fide* transfer of the note, not overdue, and for value, the holder of the security cannot discharge it to the prejudice of the holder of the note.[4] Such a taker of the note may enforce the security in the hands of the payee of the note, even though this payee could not himself have enforced the security against the maker of the note by reason of the equities

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[1] Swan, *ex parte*, Overend, *in re*, L. R. 6 Eq. 344 (overruling Lambert *ex parte*, 13 Ves. 179); Wackerbath, *ex parte*, 5 Ves. 574; Mertens *v.* Winnington, 1 Espinasse, 113; Goodall *v.* Polhill, 1 C. B. 233; Cox *v.* Earle, 3 B. & Ald. 430; Konig *v.* Bayard, 1 Peters, 250.

[2] Swan, *ex parte*, Overend, *in re*, *supra*.

[3] Williams *v.* Germaine, 7 B. & C. 468; Hoare *v.* Cazenove, 16 East, 391; Lenox *v.* Leverett, 10 Mass. 1; Schofield *v.* Bayard, 3 Wend. (N. Y.) 488.

[4] *Antea*, § 181.

[5] Vose *v.* Handy, 2 Greenl. (Me.) 322; Page *v.* Pierce, 26 N. H. 317; Blake *v.* Williams, 36 N. H. 39; Keyes *v.* Wood, 21 Vt. 331; Belding *v.* Manley, 21 Vt. 550; Dudley *v.* Cadwell, 19 Conn. 218; Evertson *v.* Booth, 19 Johns. (N. Y.) 486; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; West's Appeal, 88 Penn. St. 341; Partridge *v.* Partridge, 38 Penn. St. 78; Phillips *v.* Lewistown Bank, 18 Penn. St. 394; Hyman *v.* Devereux, 63 Nor. Car. 624; Muller *v.* Wadlington, 5 So. Car. 342; Martin *v.* McReynolds, 6 Mich. 70; Union Ins. Co. *v.* Slee, 123 Ills. 57; Mapps *v.* Sharpe, 32 Ills. 13; Pardee *v.* Lindley, 31 Ills. 174; French *v.* Turner, 15 Ind. 59; Martindale *v.* Burch, 57 Iowa, 291; Indiana Bank *v.* Anderson, 14 Iowa, 544; Bange *v.* Flint, 25 Wisc. 544; Exchange Bank *v.* Stone, 80 Ky. 109; Burdett *v.* Clay, 8 B. Mon. (Ky.) 287; Jackson *v.* Rutledge, 3 Lea (Tenn.), 626; Wolffe *v.* Nall, 62 Ala. 24; Graham *v.* Newman, 21 Ala. 497; Hobson *v.* Edwards, 57

Miss. 128; Dick *v.* Maury, 9 Sm. & M. (Miss.) 448; Holmes *v.* McGinty, 44 Miss. 94; McQuie *v.* Peay, 58 Mo. 56; Potter *v.* Stevens, 40 Mo. 229; Scott *v.* Turner, 15 La. Ann. 346; Bennett *v.* Soloman, 6 Calif. 134; Webb *v.* Hoselton, 4 Neb. 308; Creaner *v.* Creaner, 36 Ark. 91; Biscoe *v.* Royston, 18 Ark. 508.

[1] Converse *v.* Michigan Dairy Co., 45 Fed. Rep. 18; O'Neil *v.* Seixas, 85 Ala. 80; Burnett *v.* Lyford, 93 Calif. 114; Storch *v.* McCain, 85 Calif. 304; Smith *v.* Brunk, 14 Color. 75; Farrell *v.* Lewis, 56 Conn. 280; Holway *v.* Gilman, 81 Maine, 185; Gabbert *v.* Wallace, 66 Miss. 618; Patterson *v.* Booth, 103 Mo. 402; Blair *v.* White, 61 Vt. 110; Jenkins *v.* Hawkins, 34 W. Va. 799; Zwickey *v.* Hainey, 73 Wisc. 464.

[2] Wolcott *v.* Winchester, 15 Gray (Mass.), 461; Young *v.* Miller, 6 Gray (Mass.), 152; Crane *v.* March, 4 Pick. (Mass.) 131; Nelson *v.* Ferris, 30 Mich. 497; Hagerman *v.* Sutton, 91 Mo. 519; Studebaker Mfg. Co. *v.* McCargur, 20 Neb. 500; Kuhns *v.* Bankes, 15 Neb. 92; Hamilton *v.* Lubukee, 51 Ills. 415; Sargent *v.* Howe, 21 Ills. 148; Gordon *v.* Mulhare, 13 Wisc. 22; Graham *v.* Newman, 21 Ala. 497; Colt *v.* Barnes, 64 Ala. 108; Phelan *v.* Olney, 6 Calif. 478; Burhans *v.* Hutcheson, 25 Kans. 625.

[3] Esty *v.* Graham, 46 N. H. 169. But see Domestic Sewing Machine Co. *v.* Arthurhultz, 63 Ind. 322.

[4] Gordon *v.* Mulhare, 13 Wisc. 22; Keohane *v.* Smith, 97 Ills. 156; McCormick *v.* Digby, 8 Blackf. (Ind.) 99; Gottschalk *v.* Neal, 6 Mo. App. 596.

between them,[1] although this has sometimes been denied in the case of a mortgage;[2] but one who takes the note overdue will not be protected by this principle against such equities of the owner of the security.[3] The equitable lien of a vendor of land to secure the payment of a note which he has taken for the purchase-money will not usually pass to an indorsee who cannot hold the vendor for the payment of the note, since the effect of the transfer was to secure to the vendor all the advantages of a payment.[4] Nor will the mortgagee's bare right of action for a mere tort pass by his transfer of the mortgage-note.[5]

§ 186. **Rights of a Stranger upon taking up a Note.** — When,

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[1] Carpenter *v.* Longan, 16 Wallace, 271 (overruling Longan *v.* Carpenter, 1 Col. Ter. 205); Myers *v.* Hazard, 50 Fed. Rep. 155; Pierce *v.* Faunce, 47 Maine, 507; Sprague *v.* Graham, 29 Maine, 160; Taylor *v.* Page, 6 Allen (Mass.), 86; Breen *v.* Seward, 11 Gray (Mass.), 118; Green *v.* Hart, 1 Johns. (N. Y.) 580; Jackson *v.* Blodgett, 5 Cow. (N. Y.) 202; Gould *v.* Marsh, 4 Thomp. & C. (N. Y.) 128; s. c. 1 Hun (N. Y.), 566; Bloomer *v.* Henderson, 8 Mich. 395; Judge *v.* Vogel, 38 Mich. 568; Cornell *v.* Hichens, 11 Wisc. 353; Croft *v.* Bunster, 9 Wisc. 503.

[2] Hostetter *v.* Alexander, 22 Minn. 559; Johnson *v.* Carpenter, 7 Minn. 176; Baily *v.* Smith, 14 Ohio St. 396; White *v.* Sutherland, 64 Ills. 181; Sumner *v.* Waugh, 56 Ills. 531; Walker *v.* Dement, 42 Ills. 272; Olds *v.* Cummings, 31 Ills. 188; Foster *v.* Strong, 5 Ills. App. 223; Grassly *v.* Reinback, 4 Ills. App. 341; Union College *v.* Wheeler, 61 N. Y. 88; Briggs *v.* Langford, 1 Silvernail's N. Y. Ct. of Appeals, 553; Horstman *v.* Gerker, 49 Penn. St. 282; Bouligny *v.* Fortier, 17 La. Ann. 121; Jennings *v.* Vickers, 31 La. Ann. 679.

[3] Fish *v.* French, 15 Gray (Mass.), 520; Howard *v.* Gresham, 27 Ga. 347.

[4] Barnett *v.* Riser, 63 Ala. 347; Bankhead *v.* Owen, 60 Ala. 457; Hightower *v.* Rigsby, 56 Ala. 126. See generally as to the somewhat anomalous case of a vendor's lien, which is sometimes held to be merely personal to the vendor, not assignable, and not the subject of subrogation, and sometimes to pass only when manifestly so intended, and sometimes to pass like any other lien, Salem Bank *v.* Salem Flour Mills, 39 Fed. Rep. 89, and 14 Sawyer, 84; Rogers *v.* James, 33 Ark. 77; Shall *v.* Biscoe, 18 Ark. 142; Davis *v.* Smith, 88 Ala. 596; Avery *v.* Clarke, 87 Calif. 619; Gruhn *v.* Richardson, 128 Ills. 178; Dayhuff *v.* Dayhuff, 81 Ills. 499; Pillow *v.* Helm, 7 Baxter (Tenn.), 545; Hamblen *v.* Folts, 70 Tex. 132. As to subrogation to a statutory crop lien, see St. Peter's Literary Association *v.* Webb, 31 Ark. 140; Mercer *v.* Cross, 79 Ga. 432; Benson *v.* Gottheimer, 75 Ga. 642; Scott *v.* Pound, 61 Ga. 579.

[5] Gabbert *v.* Wallace, 66 Miss. 618.

chase and not an extinguishment thereof, if such was the intent of the parties.[1]

§ 187. **Holder of Note substituted to Benefit of Security given by one to another Party to the Note to secure its Payment.** — Property mortgaged to secure to the mortgagee the payment of notes indorsed by the mortgagee for the benefit of the mortgagor will be applied in equity, upon the insolvency of both maker and indorser, to the payment of such notes,[2] and may be so appropriated by the creditor upon the insolvency of only the maker.[3] And such a mortgage, not being given merely for the indemnity of the mortgagee, cannot be released by him so as to deprive the holders of the notes of their rights under the mortgage.[4] And notes issued by the mortgagee to the mortgagor in consideration of the mortgage and purporting on their face to be secured by the mortgage will be protected by the mortgage in the hands of third persons to whom they have been negotiated for value, even after a discharge of the mortgage by the nominal mortgagee.[5] But security given by one party to a note to another on a secret trust for the payment of the note will pass free of all equities to a *bona fide* purchaser for value.[6]

§ 188. **Substitution of the Holder to the Benefit of Indemnity held by an Indorser.** — Security given by the maker of a note to his accommodation indorser thereon, to indemnify the latter against his liability, is not an accessory to the principal obligation, but merely a personal indemnity, ordinarily available only upon payment by the indorser.[7] Such an indemnity would not be available to a surety upon the note who had been compelled to pay it; for the maker, though a surety, and an accommodation indorser are not co-sureties;[1] nor has an accommodation maker the rights of a co-surety against an accommodation indorser.[2] Nor have successive accommodation indorsers the rights of co-sureties against each other, unless they have agreed to become such as among themselves.[3] The holder of the note cannot in equity be substituted to the benefit of the indorser's indemnity,[4] when he has obtained no judgment against either maker or indorser, and does not aver that either is insolvent,[5] or that the debt cannot be collected on execution.[6] If the indorser has been discharged from his liability upon the note by the neglect of its holder to give him proper notice upon its dishonor, the security held for his indemnity is discharged, and neither the holder nor any other party to the note can claim the benefit of such security by subrogation to his rights;[7] for an indorser does not, by taking indemnity against his indorsement, waive his right to notice.[8] But the holder is entitled to the benefit of any securities received by an insolvent in-

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[1] Swope *v.* Leffingwell, 72 Mo. 348; Montgomery Bank *v.* Albany Bank, 7 N. Y. 459.

[2] Rice *v.* Dewey, 13 Gray (Mass.), 47; Harmony Bank's Appeal, 101 Penn. St. 428; DeMott *v.* Stockton Paperware Co., 32 N. J. Eq. 124; Ohio Life Ins. Co. *v.* Winn, 4 Md. Ch. Dec. 253.

[3] DeMott *v.* Stockton Paperware Co., 32 N. J. Eq. 124.

[4] Boyd *v.* Parker, 43 Md. 182; Hartford & N. Y. Transportation Co. *v.* Hartford Bank, 46 Conn. 569.

[5] McCracken *v.* German Ins. Co, 43 Md. 471.

[6] Mifflin County Bank's Appeal, 98 Penn. St. 150.

[7] O'Hara *v.* Baum, 88 Penn. St. 114; Hartford & N. Y. Transp. Co. *v.* Hartford Bank, 46 Conn. 569; Spiller

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v. Creditors, 16 La. Ann. 292; Peterson *v.* Willing, 3 Dall. 506.

[1] Dawson *v.* Pettway, 4 Dev. & Bat. Law (Nor. Car.), 396; Nurre *v.* Chittenden, 56 Ind. 462.

[2] Hillegas *v.* Stephenson, 75 Mo. 118; Smith *v.* Smith, 1 Dev. Ch. (Nor. Car.) 173.

[3] Stillwell *v.* How, 46 Mo. 589; McCune *v.* Belt, 45 Mo. 174; McNeilly *v.* Patchin, 23 Mo. 40; Woodward *v.* Severance, 7 Allen (Mass.), 340; Sweet *v.* McAllister, 4 *Id.* 353; Clapp *v.* Rice, 13 Gray (Mass.), 403; Smith *v.* Morrill, 54 Maine, 48; Hogue *v.* Davis, 8 Gratt. (Va.) 4; Quarrier *v.* Quarrier, 15 So. E. Rep. 154; Abercrombie *v.* Connor, 10 Ala. 293; Armstrong *v.* Cook, 30 Ind. 22.

[4] Post *v.* Tradesmen's Bank, 28 Conn. 420.

[5] *Antea*, §§ 160, 161; Nightingale *v.* Chaffee, 11 R. I. 609.

[6] Ohio Ins. Co. *v.* Reeder, 18 Ohio, 35.

[7] Virginia Bank *v.* Boisseau, 12 Leigh (Va.), 387.

[8] Ray *v.* Smith, 17 Wallace, 411, 415; Haskell *v.* Boardman, 8 Allen (Mass.), 38: Moses *v.* Ela, 43 N. H. 557; Seacord *v.* Miller, 13 N. Y. 55; Kramer *v.* Sandford, 4 Watts & Serg. (Penn.) 328; Denny *v.* Palmer, 5 Ired. Law (Nor. Car.), 610; Wilson *v.* Senier, 14 Wisc. 380; Peets *v.* Wilson, 19 La. 478. But see Story on Prom. Notes, §§ 281, 282, and cases there cited.

dorser as a surety for prior parties.[1] If all the indorsers of a bill of exchange have become such for the accommodation of the drawer, and he gives a deed of trust for the indemnity of the two last indorsers, the first indorser cannot compel them to sell the trust property and apply it to the payment of the bill; he will have no right of subrogation to their security until he pays the bill.[2]

§ 189. **Bill drawn against a Consignment of Merchandise and made a Lien upon it.** — The indorsee of a bill which purports to be drawn against a consignment of merchandise, and has annexed to it a warehouse receipt for the merchandise and a certificate by which the drawer declares a lien upon the merchandise in favor of the holder of the bill, reserving to the consignee upon whom the bill is drawn the right to sell the merchandise upon its arrival and hold its proceeds in trust for the holder of the bill, acquires by taking the bill a special property in the merchandise thus appropriated for its payment, and may enforce the trust by a bill in equity against the consignee and one to whom the latter has pledged the property after accepting the bill.[3] The indorsee or transferee of the bill acquires a special property in the goods described in the shipping documents which accompany it;[4] and the shipper is deprived of his property, and has no longer either possession or title.[5] And one who pays such a draft at the

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[1] *In re* Jaycox, 8 N. B. R. 241.

[2] Dunlap *v.* Clements, 7 Ala. 539; Buffalo Bank *v.* Wood, 71 N. Y. 405.

[3] Michigan Bank *v.* Gardiner, 15 Gray (Mass.), 362; Ullman *v.* Barnard, 7 *Id.* 554; Marine Bank *v.* Wright, 48 N. Y. 1.

[4] Dows *v.* Exchange Bank, 91 U. S. 618; Wells *v.* Oregon R. & N. Co., 32 Fed. Rep. 51; Hathaway *v.* Haynes, 124 Mass. 311; Cairo Bank *v.* Crocker, 111 Mass. 163; Chicago Bank *v.* Bailey, 115 Mass. 228; Batavia Bank *v.* Ege, 109 N. Y. 120; Commercial Bank *v.* Pfeiffer, 22 Hun (N. Y.), 327; Holmes *v.* Bailey, 92 Penn. St. 57; Holmes *v.* German Security Bank, 87 Penn. St. 525; West Michigan Bank *v.* Howard, 52 Mich. 423; Chester Bank *v.* Atlanta Ry. Co., 25 So. Car. 216; Taylor *v.* Turner, 87 Ills. 296; Halsey *v.* Warden, 25 Kans. 128; Stackville Bank *v.* Meyer, 43 La. Ann. 1; Delgado *v.* Wilbur, 25 La. Ann. 82.

[5] De Wolf *v.* Gardner, 12 Cush. (Mass.) 19; Petitt *v.* First National Bank, 4 Bush (Ky.), 334.

to it is ordinarily held to acquire no greater right of property in the goods thereby represented than belonged to the original shipper under whom he claims,[1] and since a carrier is not bound by a bill of lading given by his agent for goods which have not been actually delivered to the carrier,[2] so the indorsee of a bill of exchange purporting to be secured by such a bill of lading, though taking it *bona fide* and in reliance upon the apparent security, cannot, it is generally held, enforce the contract of the bill of lading against the carrier.[3] Nor can the indorsee compel the carrier to answer for a misdescription of the goods in the bill of lading caused by the fraud of the consignor.[4] But it is sometimes considered that the carrier is estopped, against such a *bona fide* indorsee for value, to deny his receipt of the goods stated in the bill of lading.[5] And the general rule of law has in England and in many of our States been similarly modified by statutes.[6] But if the goods are actually received by the carrier, though after the bill of lading was given, the rights of such an acceptor or indorsee are valid,[7] unless the goods were so received upon a new agreement wholly independent of the old bill of lading.[8]

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[1] The Idaho, 93 U. S. 575, 583; Maybee *v.* Tregent, 47 Mich. 495; Moore *v.* Robinson, 62 Ala. 537.

[2] Brown *v.* Powell Steam Co., L. R. 10 C. P. 562; Mackay *v.* Commercial Bank, L. R. 5 P. C. 394; Friedlander *v.* Texas Ry. Co., 130 U. S 416; Pollard *v.* Vinton, 105 U. S. 7; Sears *v.* Wingate, 3 Allen (Mass.), 103; Baltimore & Ohio R. R. Co. *v.* Wilkins, 44 Md. 11; Dean *v.* King, 22 Ohio St. 118; Louisiana National Bank *v.* Laveille, 52 Mo. 380.

[3] Pollard *v* Vinton, 105 U. S. 7; Robinson *v.* Memphis & Charlestown R. R. Co., 9 Fed. Rep. 129; Lehman *v.* Central R. R. Co, 12 Fed. Rep. 595; Baltimore & Ohio R. R. Co. *v.* Wilkins, 44 Md. 11; Adone *v.* Seeligson, 54 Tex. 593, 604; Hunt *v.* Miss. Central R. R. Co., 29 La. Ann. 446.

[4] Miller *v.* Hannibal & St. Joseph R. R. Co., 90 N. Y. 430, overruling s. c., 24 Hun, 607.

[5] Schooner Freeman *v.* Buckingham, 18 How. 182; Batavia Bank *v.* N. Y. R. R. Co., 106 N. Y. 195; Armour *v.* Michigan Central R. R. Co., 65 N. Y. 111; Meyer *v.* Peck, 28 N. Y. 590; St. Louis R. R. Co. *v.* Larned, 103 Ills. 293; Sioux City R. R. Co. *v.* Fremont Bank, 10 Neb. 556.

[6] See Valieri *v.* Boyland, L. R. 1 C. P. 382.

[7] Rowley *v.* Bigelow, 12 Pick. (Mass.) 307.

[8] The John K. Shaw, 32 Fed. Rep. 491.

§ 190. **Securities held by a Banker against his Acceptances available to their Holders.** — Securities held by a banker against his acceptances are available to the holders of the bills, through the equity of the banker or his assignees in bankruptcy to have them applied to meet the acceptances;[1] though it has been said[2] that while the rule is perfectly just where the securities are sufficient to pay the bills in full, yet if the case is otherwise it gives the bill-holders an advantage at the expense of the acceptor to which they are not entitled, and that the reasons assigned[3] for the extension of this rule to the case of a deficient security are unsatisfactory, and appear to overlook the fact that when the whole benefit of such a security is given to the bill-holder, the estate of the bankrupt acceptor may lose some part of the indemnity to which he is entitled. On the same principle, the indorser of a bill of exchange has an equitable claim upon property deposited with the drawee as a security against his acceptance thereof, upon the latter's bankruptcy.[4] But the application of this principle will not be prevented by the fact that the person who deposited the security was not a party to the bills either as drawer or indorser, provided they were drawn with respect to a transaction in which he was liable.[5] Where merchants consigned goods to one party, and by arrangement drew bills for their value upon another party, who accepted them, it was held, upon the bankruptcy of both, that remittances made by the consignor to the acceptor on account of the bills should be specifically applied to the payment of the bills.[6] Nor is this principle limited to the bankruptcy of the parties to the bills; it will be applied upon their mere insolvency.[1] The acceptor has a lien against his acceptances upon property in his hands belonging to the drawer;[2] and the holder of the bill may claim the benefit of this lien by way of substitution, just as a creditor may hold the indemnity of a surety upon the latter's insolvency.[3] A mortgage given to the acceptor of bills to secure their payment by the drawer will, upon the insolvency of the drawer and the acceptor, be applied directly to the payment of the bills.[4] So, where one who has procured bills to be drawn for his accommodation afterwards gives a deed of trust to the acceptors thereof to secure notes given to the acceptors for the amount of the acceptances, the holders of the bills may resort to the trust property for their payment when dishonored, if the notes have not been negotiated to *bona fide* holders for a valuable consideration.[5] Where the holders of a judgment given to secure them for their acceptances made for the benefit of the judgment-debtor assigned it to a prior creditor of their own, the collection of the judgment by such assignee was restrained on a bill in equity filed by the judgment-debtor for whose benefit the acceptances had been made, the holders of the acceptances were declared to have an equitable interest in the judgment, and the proceeds of the judgment were directed to be applied to their payment.[6]

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[1] Waring, *ex parte*, 19 Ves. 345; Seligman *v.* Wells, 17 Blatchf. C. C. 410; Sproule *v.* Samuel, 5 Ills. 135.

[2] Royal Bank *v.* Commercial Bank, 7 App. Cas. 366.

[3] By Lord Cranworth in Powles *v.* Hargreaves, 3 De G., M. & G. 453.

[4] Perfect, *ex parte*, Mont. Bnkcy. 25.

[5] Smart, *ex parte*, Richardson, *in re*, L. R. 8 Ch. 220.

[6] Dover, *ex parte*, Suse, *in re*, 14 Q. B. D. 611; Smart, *ex parte*, Richardson, *in re*, *supra*.

§ 191. **This Principle extends to all Parties to the Bill.** — This substitution to the benefit of security held for the payment of negotiable paper will be made for the benefit of all parties thereto who, by reason of their liability thereon, have paid the same.[7] One who has accepted a bill of exchange on the

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[1] Powles *v.* Hargreaves, 3 De G. M. & G. 430, 453.

[2] Hammond *v.* Barclay, 2 East, 227; Madden *v.* Kempster, 1 Campbell, 12.

[3] *Antea*, § 162.

[4] City Bank *v.* Luckie, L. R. 5 Ch. 773.

[5] Toulmin *v.* Hamilton, 7 Ala. 362.

[6] Heath *v.* Hand, 1 Paige (N. Y.), 329; Auburn Bank *v.* Throop, 18 Johns. (N. Y.) 505.

[7] Stevenson *v.* Austin, 3 Met. (Mass.) 474.

with the acceptor of bills for their payment remains, subject to the trust, in the drawer;[1] and so far as not applied for that purpose they are held by the acceptor for the drawer. G. in Malaga was in the habit of drawing bills on Y. in London, and of remitting bills to the latter to enable him to meet his acceptances. Y. rendered to G. half-yearly accounts, charging him with bills accepted, and crediting him with bills remitted, with a credit of interest to the same time; if a bill remitted was dishonored, then its amount was entered on the debit side, thus in effect striking it out of the account. Y. became insolvent, and compounded with his creditors. Crediting Y. with the amount he thus paid on his acceptances, the balance of account was in favor of G. At the time of suspending payment, Y. had remittances which had been thus sent to him by G. It was held that as Y. had been discharged from his liability on his acceptances by his composition, and as the remittances were specifically appropriated to the payment of the acceptances, the remainder of the remittances after Y. had been reimbursed for the amount that he paid on the bills belonged to G.[2] But if the remittances, being negotiable paper or current coin, had been passed for value to a *bona fide* holder without notice of the equities existing in favor of the drawer, the drawer could not reclaim them from such a holder.[3] On the same principle, if the acceptor of bills deposits with one banker money and negotiable securities for the express purpose of taking up his acceptances payable at another banker's, and the first banker remits the deposit to the second without notice of the instructions on which it was received, the acceptor cannot follow the property into the hands of the second banker to the prejudice of the latter's rights against the first.[4]

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[1] Pearl *v.* Clark, 2 Penn. St. 350.

[2] Gomez, *ex parte*, Yglesias, *in re*, L. R. 10 Ch. 639.

[3] Banco de Lima *v.* Anglo-Peruvian Bank, 8 Ch. D. 160; Broad, *in re*, Neck, *ex parte*, 13 Q. B. D. 740.

[4] Johnson *v.* Roberts, L. R. 10 Ch. 505.

§ 193. **Holder not substituted to Security held by one under no Liability, unless actually appropriated.** — The holder will not, upon the insolvency or bankruptcy of both drawer and drawee, be substituted to the benefit of security deposited by the drawer with the drawee to secure the latter against his intended acceptances, unless the drawee has accepted the bills, or unless the holder has the right to prove his demand against the estate of both the drawer and the drawee.[1] Nor will such substitution be allowed if the security is held by the acceptor, not specifically against the acceptances, but for the payment of any money which should be due from the drawer to the acceptor, even though there may be no indebtedness apart from the bills.[2] But an actual appropriation to the payment of bills of property consigned by the drawer to the drawee will be upheld,[3] although the latter has not accepted the bills.[4] The consignor of coffee drew bills upon the consignees, which bills were negotiated to the plaintiff. The bills did not purport to be drawn against any particular shipment. The consignee refused to accept the bills, and they were protested. The consignor then wrote to one S., asking him to take charge of the consignment, realize on it, and honor the bills. The day before the maturity of the bills, S. wrote to the plaintiff, saying that he expected soon to receive from the consignees the coffee sent by the drawer against the bills, and would then write the plaintiff again. Soon afterwards S. received the warrants for the coffee from the consignees, and wrote to the plaintiff to that effect, referring to his previous letter, and saying he should dispose of the coffee as instructed by the consignor, and would send further particulars in due time. The same day the consignees attached the coffee as the property of a firm who they alleged had an interest in it, but with whom S. had had no dealings; but it was held, on the plaintiff's bill in equity, that the consignor had given S. authority to make an equitable charge upon the property, and S. had acted on that authority, and that the coffee must be applied to the payment of the bills.[1]

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[1] Vaughan *v.* Halliday, L. R. 9 Ch. 561.

[2] Levi's Case, L. R. 7 Eq. 449; Smith, *in re*, 15 N. B. R. 459.

[3] Ross *v.* Saulsbury, 52 Ga. 379; Allen *v.* Williams, 12 Pick. (Mass.) 297. See Matter of Le Blanc, 4 Abbott, New Cas. (N. Y.) 221.

[4] Frith *v.* Forbes, 4 De G. F. & J. 409; Marine Bank of Georgia *v.* Jauncey, 1 Barb. (N. Y.) 486; *antea*, § 189.

§ 194. **Right of Holders to Securities held by Acceptor not a paramount one.** — This right of the holders of negotiable paper to be substituted to the benefit of securities for its payment given by one of the debtors upon it to another cannot be preferred to the legal rights of prior creditors of both these debtors in the same transaction. This principle was established in an English case, in which it appeared that two separate firms, one in Bombay and one in London, were engaged in the joint adventure of buying and selling goods in England and in India. The Bombay firm drew bills on the London firm, which they discounted in India; and with the proceeds they bought cotton, which they consigned to London, specially to meet these acceptances. Both firms being insolvent, the holders of certain unpaid bills which had been drawn and accepted in this way claimed to have the proceeds of the shipments of cotton appropriated to their payment; and it was held that they were entitled to this appropriation, but that it must be subject to the right of any creditors of the joint adventure to have the cotton applied first to their payment as part of the assets of the joint adventure.[2] And it has been intimated that the rule that securities held by a banker against his acceptances are available to the holders of the bills will not be applied in bankruptcy where the drawers owe the acceptors on other accounts more than the amounts of the bills, at least if the acceptors have a general lien on the securities so deposited with them.[3] If the drawer

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[1] Ranken *v.* Alfaro, 5 Ch. D. 786.

[2] Dewhurst, *ex parte*, L. R. 8 Ch. 965. And see Addison *v.* Burckmyer, 4 Sandf. Ch. (N. Y.) 498.

[3] Royal Bank *v.* Commercial Bank, 7 App. Cas. 366; Hickie's Case, L. R. 4 Eq. 226.

employed B. in South America to purchase goods for him. The mode adopted was that B. raised money by drawing bills on A. and selling them, and with the proceeds bought goods, which he shipped to Liverpool, consigned to A. In his accounts, B. credited A. with the bills, and charged him with the cost of the goods and with his commissions; and in his letters he directed A. to place the price of the goods to his credit and the bills to his debit. Both A. and B. became bankrupt. When A. became bankrupt, goods were in transit to Liverpool; and some of the bills out of the proceeds of which the goods had been bought had been accepted, and others were presented to A. after his bankruptcy, and were unaccepted. The goods having arrived and come into the possession of A.'s trustees in bankruptcy, it was held that the holders of the bills had no right to have the goods specifically appropriated to their payment. The property in the goods passed to A., subject only to B.'s right of stoppage *in transitu;* it did not revest in B. upon A.'s failure to accept some of the bills; and the facts showed no agreement by which B. would have a charge on the goods in the hands of A. and a right to have them applied to take up the bills.[1] If the property was purchased originally at the joint risk of the drawer and the drawee, although the drawee has promised the drawer to protect the bills, but has afterwards, upon the insolvency of the drawer, refused to accept them, the right of the holders of the bills to the property will be limited to the surplus of its proceeds over the amount due from the drawer to the drawee.[2] A mere direction in a bill of exchange to place the amount to the account of a shipment made by the drawer to the acceptor,[3] or a mere letter of advice accompanying the bill to the effect that the bill is drawn on account of a specified shipment,[1] will not operate a specific appropriation of that shipment to the payment of the bill, which can be enforced against a purchaser of the goods from the acceptor; just as the mere fact that bills are given in partial payment for property agreed to be sold by the drawer to the acceptor, upon which the seller retains a lien for the unpaid portion of the price, will not, upon the bankruptcy of both parties, give to the persons to whom the bills have been negotiated any lien upon the property for their payment.[2]

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[1] Banner, *ex parte*, Tappenbeck, *in re*, 2 Ch. Div. 278.

[2] Robey *v.* Ollier, L. R. 7 Ch. 695, limiting and explaining Frith *v.* Forbes, 4 De G., F. & J. 409.

[3] Brown *v.* Kough, 29 Ch. D. 848; Entwistle, *in re*, Arbuthnot, *ex parte*, 3 Ch. Div. 477.

§ 196. **Holder's Right to Application of Security perishes with that of its Depositor.** — If the drawer of bills holding security from the acceptor for their payment has, by the substitution of new bills therefor, lost the right, as against the acceptor, to have the security applied for their payment, the holder of the old bills, claiming under the drawer, will also be deprived of such right. Thus, a debtor borrowed money from a corporation, giving it his acceptances, and depositing shares as security therefor. When the bills became due, the corporation presented to him fresh bills for acceptance stating them to be in place of those falling due; and he accepted the new bills accordingly. Both he and the corporation then became insolvent. Both sets of bills being still outstanding, it was held that the holders of the first bills had no equity to have them paid out of the shares; for the letter and the debtor's new acceptances had put an end to the security as to the first set of bills.[3] But it is to be observed that the first set of bills did not purport to be drawn against the security.[4]

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[1] Phelps *v.* Comber, 29 Ch. D. 813, affirming s. c., 26 Ch. D. 755, and approving Perseverance Iron Works *v.* Ollier, L. R. 7 Ch. 695; Brown *v.* Kough, 29 Ch. D. 848, overruling on this point Frith *v.* Forbes, 4 De G., F. & J. 409.

[2] Lambton, *ex parte*, Lindsay, *in re*, L. R. 10 Ch. 405.

[3] General Rolling Stock Co., *in re*, L. R. 4 Ch. 423.

[4] See McCracken *v.* German Ins. Co., 43 Md. 471.

§ 197. **Taking Bill on the Credit of the Funds is not enough.** — Although the drawer of a bill has funds in the hands of the drawee, and the holder takes it upon the assurance of the drawer that the funds are specifically appropriated to the payment of the bill,[1] this assurance will not of itself operate such an appropriation, unless the bill was so drawn against that particular fund as to constitute an equitable assignment thereof;[2] otherwise, the mere drawing and negotiation of the bill does not pass any right to the fund.[3] Thus, where the plaintiffs bought a bill of exchange on the assurance of the drawer that there were funds in the hands of the drawee which were specifically appropriated to meet it, but before any acceptance of the bill the drawer stopped payment, although it was at first considered, upon the plaintiffs' bill against both drawer and drawee, that the plaintiffs, having taken the bill upon the faith of these representations, were entitled to be paid its amount out of the funds of the drawer in the hands of the drawee, yet on appeal it was decided that the plaintiffs had no right to any charge upon these funds.[4] Where one bank has deposited bonds with another bank as security against its overdrafts, and has then become insolvent, being indebted to the second bank, the holders of such bills, drawn by the first bank before its insolvency but presented afterwards, cannot resort to the proceeds of these bonds to the prejudice of the right of the second bank to apply them upon its own demand.[5]

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[1] Canton Bank *v.* Dubuque R. R. Co., 52 Iowa, 378.

[2] See Smith, *in re*, 16 N. B. R. 399; Tremont Nail Co., *ex parte*, *Id.* 448; Brill *v.* Tuttle, 81 N. Y. 454, reversing s. c., 15 Hun, 289; Attorney-General *v.* Continental Ins. Co., 71 N. Y. 325; Kahnweiler *v.* Anderson, 78 Nor. Car. 133; Wellsburg Bank *v.* Kimberlands, 16 W. Va. 555.

[3] Whitney *v.* Eliot Bank, 137 Mass. 351; Bush *v.* Foote, 58 Miss. 5; Commerce Bank *v.* Bogy, 9 Mo. Ap. 335. But see Cincinnati Bank *v.* Coates, 3 McCrary, C. C. 9.

[4] Thomson *v.* Simpson, L. R. 5 Ch. 659; reversing s. c., L. R. 9. Eq. 497.

[5] Garvin *v.* State Bank, 7 So. Car. 266.

extinguished as to the holders of other liens upon the mortgaged property; for the acceptor was the principal debtor upon the bill, and simply paid his own debt in paying it; and the mortgage, containing no stipulation in his behalf, cannot be kept alive for his benefit, or for the benefit of any other person, unless this results from the terms of the bill itself.[1] An indorser and an accommodation acceptor of a bill are not co-sureties; and the acceptor cannot be subrogated to the benefit of a mortgage given by the drawer to the indorser to indemnify the latter against his liability, even though the bill was paid after being protested by giving to its holder the note of the drawer, with the indorser and the acceptor as sureties thereon, and the acceptor on paying this note took an assignment of all the securities in the hands of the indorser and of the holder, because the mortgage was given only for the personal indemnity of the indorser and not for the payment of the bill, so that the acceptor had no right to it; and on the indorser's being indemnified by the acceptor's payment of the substituted note, the mortgage became *functus officio.*[2] But in New York it has been decided that although at law the accommodation acceptor of a bill is regarded in favor of a *bona fide* holder of the bill as the principal debtor thereon, yet as between the drawer and such acceptor the latter is regarded in equity as merely a surety, and is entitled upon his payment of the bill to be subrogated to the benefit of any securities taken by the holder of the bill from the drawer to secure its payment; and accordingly, in an action against such an acceptor by a non-resident holder of the bill, the drawer having become insolvent, the defendant may, under the code allowing the giving of both legal and equitable relief in the same action, demand such subrogation upon payment of the amount due to the plaintiff.[3]

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[1] Salaun *v.* Relf, 4 La. Ann. 575.

[2] Gomez *v.* Lazarus, 1 Dev. Eq. (Nor. Car.) 205.

[3] Toronto Bank *v.* Hunter, 4 Bosw. (N. Y.) 646.

§ 200. **Acceptor's Securities to be applied upon all Acceptances alike.** — Security in the hands of an acceptor for the payment of his acceptances will, in case of need, be applied to the payment of all the acceptances alike.[1] If the holders of some of the acceptances have established their right by litigation, they will be preferred only to the extent of a fair share of the expenses of their litigation. Thus, a drawer having given to his acceptor a judgment as security for his acceptances, these acceptances were negotiated; and some of them remained unpaid in the hands of three firms. The acceptor assigned a portion of the judgment to two of these firms, as collateral security for the payment of the drafts which they respectively held. They enforced the judgment at their own expense, and claimed to be fully paid out of its proceeds, leaving only a small balance for the benefit of the other firm, which had taken no part in the litigation. But it was held that the security of the judgment attached to all the unpaid acceptances alike, and that the holders were entitled to *pro rata* shares of the money, which had been collected, the litigants receiving in addition to their dividend a fair share of the costs and expenses of their litigation. But the court also said that such third firm would be required to exhaust whatever independent securities they had, and should not be allowed to receive their *pro rata* share until such other securities had been exhausted or shown to be worthless, and that anything which they might receive from such securities should be reckoned as a part of their dividend, so as to increase the share of the two firms which had borne the burden of the litigation and had realized the fund.[2]

§ 200 *a*. **Subrogation of Holder of Check to Rights of Drawer.** — By analogy to the now widely adopted rule that one for whose benefit a promise is made, though not a party to the contract or privy to the consideration, may maintain an action thereon,[1] it has been occasionally decided that the holder of a check is subrogated to the rights of its drawer, the depositor, and may sue the bank, upon its failure to pay the check, in his own name.[2] But the old rule is still generally maintained, that such an action can be brought only by the depositor.[3] But it has been held that a check drawn against the whole of a specific fund deposited in the bank in the name of the drawer, but belonging in equity to the payee, transfers to the payee on its delivery to him the legal title to the deposit,[4] and that when this payee, in pursuance of his prior parol assignment of the fund made for value, indorses and delivers the check to his assignee, the title to the deposit vests in that assignee, even against subsequently attaching creditors of the depositor,[5] though an ordinary check cannot be treated as an equitable assignment of the money for which it calls,[6] and would not, before its payment or acceptance or certification by the bank, give the payee any rights against a creditor of the depositor making an intervening attachment.[7]

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[1] Franklin County Bank *v.* Greenfield Bank, 138 Mass. 515.

[2] Kramer's Appeal, 37 Penn. St. 71.

§ 201. **Whether Suits or Judgments extinguished upon Payment by Parties secondarily liable.** — If separate suits have been brought against the maker and the indorser of a promissory note, and the indorser pays the amount due with the agreement that the suit against the maker shall be prosecuted for

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[1] *Antea*, §§ 85, 171 *a*.

[2] Fonner *v.* Smith, 31 Neb. 107, and cases there cited; Union Bank *v.* Oceana Bank, 80 Ills. 212; Lester *v.* Given, 8 Bush (Ky.), 357; Roberts *v.* Austin, 26 Iowa, 315; Fogarties *v.* State Bank, 12 Rich. Law (So. Car.), 518.

[3] First Nat'l Bank *v.* Whitman, 94 U. S. 343; Bank of Republic *v.* Millard, 10 Wallace, 152; Essex County Bank *v.* Bank of Montreal, 7 Biss. C. C. 193; Carr *v.* Security Bank, 107 Mass. 45; Maginn *v.* Dollar Savings Bank, 131 Penn. St. 362.

[4] German Savings Institution *v.* Adae, 1 McCrary, C. C. 501.

[5] Hemphill *v.* Yerkes, 132 Penn. St. 545.

[6] Hopkinson *v.* Forster, L. R. 19 Eq. 74; Schroeder *v.* Central Bank, 24 Weekly Reporter 710; s. c., 34 L. T. N. S. 735.

[7] Bank of Commerce *v.* Russell, 2 Dillon, C. C. 215; Ballard *v.* Randall, 1 Gray (Mass.), 605.

action against a notary for negligence in making a protest of the note, whereby other parties were released.[1] The payment of a note by one of several joint promisors extinguishes it, and it cannot afterwards be kept alive against the other signers.[2] Nor will either the maker or a surety for the maker acquire by paying a judgment on the note any right of action against the indorser.[3]

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[1] *Semble* in Warren Bank *v.* Parker, 8 Gray (Mass.), 221.

[2] Stevens *v.* Hannan, 88 Mich. 13; s. c., 86 Mich. 305.

[3] Allegheny R. R. Co. *v.* Dickey, 131 Penn. St. 86.

CHAPTER VI.

SUBROGATION IN THE ADMINISTRATION OF ESTATES.

SECTION
Subrogation of Executor or Administrator to Debts and Legacies which he has paid . . . 202
Such Subrogation must be seasonably claimed. Its Limitations 203
Subrogation in Favor of Creditors of Deceased. Marshalling of Assets 204
Creditors subrogated to Charge upon Property purchased from Funds of the Deceased Debtor . 205
Creditors subrogated to Rights of Executors to Reimbursement . 206
Where the Creditor entitled to hold Two Funds 207
Subrogation between Tenant for Life and Remainder-man . . 207 *a*
Subrogation in Favor of Legatees 208
In Favor of a Purchaser from the Personal Representative . . . 209
Where Legatees have paid Judgments against the Estate . . 210
SECTION
Subrogation in Favor of Specific Devisees and Legatees . . . 211
Subrogation of Devisees to subsequently acquired Assets . . . 212
Rights of Heirs, Devisees, or Legatees against each other . . . 213
Specific Devise or Legacy chargeable with Expense incurred for its Protection 214
Rights of Heirs among themselves 215
Rights of Purchaser from Heir or Devisee 216
Creditors subrogated to the Rights of Legatees 217
Subrogation of Devisee or Legatee who is disappointed by the Election of another 218
Extent of the Right of Substitution 219
This does not extend to a Devise merely upon Condition . . . 220

§ 202. **Subrogation of Executor or Administrator to Debts and Legacies which he has paid.** — If an executor or administrator pays debts of the estate out of his own means to the value of the assets in his hands, he may apply these assets to reimburse himself; and by such election these assets become his own property;[1] but his subrogation will be carried to no greater extent than the actual value of his payments.[2] So upon his payment of his testator's debts, he will be subrogated to an equitable charge upon property charged by the will with the payment of debts, but will not become the absolute owner of such property.[1] And although an executor ordered to sell land cannot himself retain it, as he may personal assets, yet, if the personal estate proves to be insufficient, and he has paid debts of the estate to the value of the land out of his own property, he may, upon a sale of the land, retain the proceeds of the sale for his own indemnity.[2] His right to be reimbursed for advances properly made for the benefit of the estate is paramount to the claims of the distributees.[3] So, if he has paid debts of the deceased to an amount exceeding the available personal assets, he may for his indemnity be subrogated to the rights of the creditors whom he has paid[4] against the lands of the deceased,[5] and may subject the real estate in the hands of the heirs for his reimbursement;[6] and a surety of the administrator upon his payment may be subrogated to this right of his principal.[7] Though an administrator acts at his own peril in paying unpreferred debts of his intestate before he could lawfully be called upon to pay them, and if the estate afterwards turns out to be insolvent cannot charge it with the full amount so paid by him,[8] yet, in the absence of statute regulations, he may, by subrogation to the rights of the creditors whom he has thus satisfied, receive the share of

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[1] Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312; Chesson *v.* Chesson, 8 Ired. Eq. (Nor. Car.) 141; Milam *v.* Ragland, 19 Ala. 85; Buckingham *v.* Wesson, 54 Miss. 526; Hancock *v.* Minot, 8 Pick. (Mass.) 29, 37, 38.

[2] Powell *v.* Powell, 80 Ala. 11; Sorrels *v.* Trantham, 48 Ark. 386; Amos *v.* Heatherby, 7 Dana (Ky.), 45.

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[1] Graham *v.* Jones, 24 So. Car. 241.

[2] Turner *v.* Shuffler, 108 Nor. Car. 642; Livingston *v.* Newkirk, *supra*; Clayton *v.* Somers, 27 N. J. Eq. 230; Wheeler *v.* Wheeler, 1 Conn. 51.

[3] Pendergrass *v.* Pendergrass, 26 So. Car. 19; Terrell *v.* Rowland, 86 Ky. 67.

[4] Gundry *v.* Henry, 65 Wisc. 559.

[5] Crowley *v.* Mellon, 52 Ark. 1; Gaw *v.* Huffman, 12 Gratt. (Va.) 628; Kinney *v.* Harvey, 2 Leigh (Va.), 70; Smith *v.* Hoskins, 7 J. J. Marsh. (Ky.) 502.

[6] Collinson *v.* Owens, 6 Gill & J. (Md.) 4; Gist *v.* Cockey, 7 H. & J. (Md.) 134; Goodbody *v.* Goodbody, 95 Ills. 456; Black *v.* Black, 42 Iowa, 694; McCullough *v.* Wise, 57 Ala. 623.

[7] Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419.

[8] Haslett *v.* Glenn, 7 Harr. & J. (Md.) 17; Rhea *v.* Greer, 86 Tenn. 59.

negligence.[1] And one executor who has paid legacies that should have been paid by the other may be subrogated to the benefit of security given by that other for their payment.[2]

§ 203. **Such Subrogation must be seasonably claimed. Its Limitations.** — The claim of personal representatives to be substituted to the rights of creditors whom they have satisfied must be seasonably made.[3] Though an executor who has, in pursuance of a bond given by his testator, made a deed with covenants of warranty, on which he has been sued and subjected to the payment of damages, is entitled to be subrogated to the rights of the obligee in the bond, and thereby to be reimbursed out of the estate, yet, if the estate was settled in chancery, and the executor, with notice of the claim, failed to have this subrogation provided for in the decree for the settlement of the estate, he cannot afterwards, without explanation of his laches, maintain a bill for his reimbursement against legatees to whom he has paid their legacies.[4] Or, if his course of administration has been irregular and without regard to the rights of creditors, as by paying simple contract debts and leaving specialties unpaid, his claim for reimbursement has no right of priority on a deficiency of assets.[5] He must show that property charged by the will with the payment of debts has been faithfully administered and has proved to be inadequate, before he can be allowed a lien upon the testator's other estate for his indemnity.[6] If an administrator has in his hands the proceeds of property sufficient to pay a preferred mortgage to which it is subject, and instead of paying the mortgage-debt pays another demand, he cannot recover back the latter payment, if the fund subsequently, by reason of his own laches, becomes insufficient to pay the mortgage-debt.[1] Though any trustee who has in good faith paid out his own money for the protection of the trust estate, by discharging claims against it, is entitled to relief by subrogation to the rights of the creditors whom he has thus satisfied,[2] yet this subrogation to the rights of creditors to whom he has paid more than their proportion of the assets will not be for his own benefit, but for the protection of those creditors who have not received what they were entitled to demand.[3]

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[1] Adair *v.* Brimmer, 74 N. Y. 539; Smith *v.* Pettigrew, 34 N. J. Eq. 216; Hays *v.* Hays, 3 Tenn. Ch. 88.

[2] Miller's Appeal, 127 Penn. St. 95.

[3] *Antea,* § 110; Donnell *v.* Cooke, 63 Nor. Car. 227; Loomis's Appeal, 29 Penn. St. 237; Allen, *ex parte,* 15 Mass. 58.

[4] Lambert *v.* Hobson, 3 Jones Eq. (Nor. Car.) 424.

[5] Greiner's Estate, 2 Watts (Penn.), 414; Findlay *v.* Trigg, 83 Va. 539; Moye *v.* Albritton, 7 Ired. Eq. (Nor. Car.) 62; Evans *v.* Halleck, 83 Mo. 376.

[6] Frary *v.* Booth, 37 Vt. 78, 93.

§ 204. **Subrogation in Favor of Creditors of Deceased. Marshalling of Assets.** — The equitable rule adopted in the marshalling of assets, that where one creditor may resort to two funds for the satisfaction of his demand, another creditor who can hold only one of these funds may compel the former to take his satisfaction out of that to which the latter has no resort,[4] is of general application in the settlement of estates,[5] especially in those cases in which one class of creditors can avail themselves of both the real and the personal property of the deceased, while another class is restricted to the personal assets. If the creditors of the former class exhaust the personal estate, those of the latter class will be subrogated to their rights against the real estate, to the extent to which the former have appropriated the personal estate for their satisfaction.[6] If a testator had purchased an estate in his lifetime, and after his death the purchase-money is paid out of his personal assets; the right of his simple-contract creditors, if necessary for their satisfaction, to be subrogated to the vendor's lien upon this estate against the devisees thereof, though at first left undecided,[1] has since been established.[2] But the creditor of an intestate is not, in the absence of special circumstances, entitled to be substituted to the rights of the heirs in respect of a debt due to them as such heirs.[3] Creditors who have been postponed because of a belief that all property had been discovered and exhausted may, upon the discovery of further assets, be subrogated to the rights of those to whom they were postponed.[4]

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[1] Succession of Foster, 4 La. Ann. 479.

[2] Robb's Appeal, 41 Penn. St. 45; Boyd *v.* De Ham, 12 Lea (Tenn.), 175; Lewis *v.* Nichols, 38 Tex. 54.

[3] Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35; State *v.* McAleer, 5 Ired. Law (Nor. Car.) 632; Robinson *v.* Chairman, 8 Humph. (Tenn.) 374.

[4] *Antea*, § 61 *et seq.*

[5] Rice *v.* Harbeson, 63 N. Y. 493; Hill *v.* Mellon, 55 Ark. 450.

[6] Aldrich *v.* Cooper, 8 Vesey, 382; Cralle *v.* Meem, 8 Gratt. (Va.) 496.

§ 205. **Creditors subrogated to a Charge upon Property purchased from Funds of the Deceased Debtor.** — If an administrator or other trustee purchases property with the assets of the trust, the creditors and *cestuis que trustent* may in equity treat such property as part of the trust estate.[5] Where a widow, before the appointment of any administrator upon the estate of her deceased husband, used his assets in making a partial payment for land which she purchased, giving her note for the remainder of the purchase-money with a surety, and the surety afterwards paid the note, and took a deed of the land for his indemnity, it was decided that this surety held the title to the land in trust for the creditors and distributees of the deceased, subject, however, to his own prior lien for what he had been compelled to pay as surety upon the note.[6] This is an application of the familiar rule that the beneficiary of property which has been impressed with a trust character may follow the proceeds of such property into the hands of any one but a *bona fide* holder for value without notice.[7]

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[1] Austen *v.* Halsey, 6 Vesey, 475.

[2] Selby *v.* Selby, 4 Russ. 336.

[3] Turner *v.* Faucett, 6 Ired. Eq. (Nor. Car.) 549.

[4] Clifford *v.* Campbell, 65 Tex. 243.

[5] Mason *v.* Pomeroy, 151 Mass. 164; Evertson *v.* Tappen, 5 John. Ch. (N. Y.) 497; Van Horn *v.* Fonda, *Id.* 388; Breit *v.* Yeaton, 101 Ills. 242; Shaw *v.* Thompson, 1 Sm. & M. Ch. (Miss.) 628; Blake *v.* Chambers, 4 Neb. 90.

[6] Miller *v.* Birdsong, 7 Baxter (Tenn.), 531.

[7] Hopper *v.* Conyers, L. R. 2 Eq. 549; Mount *v.* Suydam, 4 Sandf. Ch. (N. Y.) 399; Green *v.* Givan, 33 N. Y.

cannot be greater than those of the executors for whom they are substituted;[1] and accordingly if the executors, being themselves in default to the trust estate, would not be entitled to indemnity except upon condition of making good their default, the creditors are in no better condition, and cannot have their debts paid out of the fund unless the default is first made good.[2] Debts thus incurred by the executors, though having equal standing as among themselves,[3] must be postponed to the proper debts of the deceased.[4] But in the absence of such considerations, where trustees who are authorized to carry on a business contract properly debts, the creditors may not only hold the trustees personally, but may also resort to the trust fund for their payment.[5]

§ 207. **Where the Creditor entitled to hold Two Funds.** — The common-law rule that the personal estate of a deceased person will be applied to the payment of his debts to the relief of his real estate[6] will not be enforced when it is in apparent hostility to the intent of the deceased as expressed in his will, and would defeat bequests made therein.[7] In a case in New York, it appeared that a deceased citizen of that State had by his will authorized his executors to reduce all the property real and personal of which he should die possessed in America into divisible shape, and after the payment of debts and testamentary expenses to divide it into seven shares, and distribute these in a specified manner. When he executed his will his property was mostly personal; but he afterwards purchased real estate in South Carolina, paying part of the purchase-money in cash, and giving his bond secured by a mortgage on the land for the remainder. The will was admitted to probate in New York as a will of both real and personal property, but in South Carolina only as a will of personal property, not having the number of witnesses required by the laws of that State for a will of real estate. All the legatees under the will were aliens, except the beneficiaries of one of the shares, to whom as heirs-at-law the real estate descended. The holder of the mortgage-bond presented it as a claim against the estate; and the Court of Appeals held that to pay this bond out of the personal estate would defeat the obvious intent of the testator to have all his real and personal estate in this country divided equally among the beneficiaries under his will; and that the doctrine of two funds would be applied by requiring the bond-creditor to exhaust his remedy under his mortgage against the real estate before resorting to the personal property, which alone was available to the claimants under the will.[1] When a court of equity has control of both the real and the personal estate, it will, in order to save expense and delay, apply them in the order in which, as between the heir and the executor they are liable.[2]

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[1] Evans *v.* Evans, 34 Ch. D. 597; Strickland *v.* Symons, 22 Ch. D. 666; Laible *v.* Ferry, *supra.*

[2] Dowse *v.* Gorton, 40 Ch. D. 536; *in re* Johnson, 15 Ch. Div. 548.

[3] Mason *v.* Pomeroy, 151 Mass. 164.

[4] Jones *v.* Walker, 103 U. S. 444; Morrow *v.* Morrow, 2 Tenn. Ch. 549.

[5] Owen *v.* Delamere, L. R. 15 Eq. 134; Thompson *v.* Andrews, 1 Myl. & K. 116; Cutbush *v.* Cutbush, 1 Beav. 184; Richardson, *ex parte,* 3 Madd. 138; Garland, *ex parte,* 10 Ves. 110; Jones *v.* Walker, 103 U. S. 444; Smith *v.* Ayer, 101 U. S. 320, 330; Burwell *v.* Mandeville, 2 Howard, 560; Pitkin *v.* Pitkin, 7 Conn. 307.

[6] Hanson *v.* Hanson, 70 Maine, 508; Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312; Scott *v.* Morrison, 5 Ind. 551; Whitehead *v.* Gibbons, 10 N. J. Eq. (2 Stockt.) 230; McKay, *v.* Green, 3 Johns. Ch. (N. Y.) 56.

[7] Graves *v.* Hicks, 6 Sim. 391; Rogers *v.* Rogers, 1 Paige (N. Y.), 188; Manning *v.* Spooner, 3 Vesey, Jr., 114; Harvey *v.* Steptoe, 17 Gratt. (Va.) 289; Clinefelter *v.* Ayres, 16 Ills. 329; Marsh *v.* Marsh, 10 B. Mon. (Ky.) 360; Iowa Loan Co. *v.* Holderbaum, 52 N. W. Rep. 550; Lightfoot *v.* Lightfoot, 27 Ala. 351.

§ 207 *a*. **Subrogation between Tenant for Life and Remainder-man.** — Where a testator devised all his estate both real and personal to his wife for her life, with remainder over, and directed his executrix to pay his debts as soon as possible out of any funds which she might obtain for that purpose, it was held that the tenant for life and the remainder-man must contribute for the payment of debts according to their respective interests, and that advances made by the tenant for life for that purpose constituted a lien upon the estate as against the remainder-man.[1] The same rule has been applied in other courts.[2] Where a husband conveyed land which was subject to a mortgage for his own debt, to be held in trust for his wife for her life, with remainder in one half to her heirs or devisees and in the other half to his heirs or devisees, it was held that she might for the protection of her estate pay off this mortgage, and that she having done so, her devisees were entitled after her death to hold the mortgage lien upon the whole tract against her husband's heirs, until the latter should contribute their equitable proportions of the principal sum due on the mortgage-debt and of the interest accruing after her death, as it was her duty to keep down this interest during her life.[3] The redemption of the tenant for life is for the benefit of the remainder-man as well as of himself, upon the remainder-man's contributing his proportion of the expense; until this is done, the tenant for life can insist upon being subrogated to the original lien.[4]

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[1] Rice *v*. Harbeson, 63 N. Y. 493.

[2] Goodburn *v*. Stevens, 1 Md. Ch. Dec. 420.

§ 208. **Subrogation in Favor of Legatees.** — A legatee will be allowed the same right of subrogation as would be enjoyed by a creditor.[5] If the personal estate of a testator, not being sufficient to pay debts and legacies, has been exhausted by the executor in the payment of creditors whose debts are chargeable on both the real and the personal estate, a legatee, as between himself and the heirs, is entitled to stand in the place of the creditors *pro tanto*, and to receive

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[1] Peck *v.* Glass, 6 How. (Miss.) 195; Watts *v.* Watts, 2 McCord Ch. (So. Car.) 77; Whitney *v.* Salter, 36 Minn. 103.

[2] Amory *v.* Lowell, 1 Allen (Mass.), 504; Durham *v.* Rhodes, 23 Md. 233, Hawkins *v.* Skeggs, 10 Humph. (Tenn.) 31; Jacocks *v.* Bosman, 1 Dev. & Bat. Eq. (Nor. Car.) 192.

[3] Ohmer *v.* Boyer, 89 Ala. 273.

[4] Allen *v.* De Groodt, 105 Mo. 442.

[5] Alexander *v.* Miller, 7 Heisk. (Tenn.) 65.

§ 209. **In Favor of a Purchaser from the Personal Representative.** — The purchaser of a deceased person's real estate at an invalid sale made thereof by the personal representative for the payment of debts, having paid his purchase-money and this having been applied to the payment of debts and charges of administration, is entitled, upon an avoidance of the sale, to be subrogated to the rights of the creditors and of the personal representative whom he has satisfied, and to charge the land with the debts and expenses so paid by him,[1] to the extent to which the land was liable for such debts and expenses.[2] The land will for the protection of a purchaser be charged with the debts which have thus been paid out of his purchase money.[3] A purchaser of personal property from a guardian will be protected in the same way.[4] This right of a purchaser has already been considered.[5] But it has been said that if the title of the purchaser fails by reason of a want of jurisdiction of the court ordering the sale over the heirs, the purchaser will not be so subrogated against them,[6] the debts paid not having been liens upon the land. Though a purchaser of land of a testator at a sale thereof made under a judgment against the executor acquires no title by his purchase, yet, if he pays his purchase-money in good faith under the belief that he is acquiring a good title, and this is applied to the payment of the judgment-debt, which was charged upon the land by the will, he will be subrogated to the benefit of this charge, and will be allowed to hold the land until he has been reimbursed to this extent.[1] But the mere fact that the purchase-money has been applied to the payment of the debts of the deceased will not entitle the purchaser of his real estate from the administrator to a lien upon the land for his reimbursement upon the sale being set aside, if such debts do not appear to have been a charge upon the land.[2] Nor, if the administrator puts himself in the place of the purchaser, can he, as a relief against his own wrong in making the sale, claim the subrogation which might have been allowed to the innocent purchaser.[3]

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[1] Cathcart *v.* Sugenheimer, 18 So. Car. 123; Kinney *v.* Knoebel, 51 Ills. 112; Short *v.* Porter, 44 Miss. 533; Bland *v.* Bowie, 53 Ala. 152; Folts *v.* Ferguson, 77 Tex. 301; Wheeler *v.* Wheeler, 1 Conn. 51; Hudgins *v.* Hudgins, 6 Gratt. (Va.) 320.

[2] Springs *v.* Harven, 3 Jones Eq. (Nor. Car.) 96; Young *v.* Twigg, 27 Md. 621; Duncan *v.* Gainey, 108 Ind. 579; Jones *v.* French, 92 Ind. 138; Neel *v.* Carson, 47 Ark. 421; Waggener *v.* Lyles, 29 Ark. 47; Pool *v.* Ellis, 64 Miss. 555.

[3] Caldwell *v.* Palmer, 6 Lea (Tenn.), 652; Stults *v.* Brown, 112 Ind. 370; Gaines *v.* Kennedy, 53 Miss. 103; Hill *v.* Billingsley, *Id.* 111; Cunningham *v.* Anderson, 107 Mo. 371; Long *v.* Joplin Mining Co., 68 Mo. 422; Schaefer *v.* Causey, 8 Mo. Ap. 142; Brown *v.* Bouney, 30 La. Ann. pt. I. 174; Sharkey *v.* Bankston, *Id.* pt. II. 891.

[4] Harrison *v.* Ilgner, 74 Tex. 86.

[5] *Antea*, § 30 *et seq.*

[6] Bishop *v.* O'Conner, 69 Ills. 431; Jones *v.* Woodstock Iron Co., 10 So. Rep. 635.

§ 210. **Where Legatees have paid Judgments against the Estate.** — Legatees who have paid a judgment rendered in favor of a creditor of the estate against the executor have for their reimbursement the right to be subrogated to the remedies of the judgment-creditor, if the claim of the creditor was reduced to a judgment, or otherwise made a lien upon the assets to which the legatees are entitled to look,[4] but not otherwise;[5] for one who pays a debt for which he was not personally liable, and which was not a charge upon his property will not be substituted to the benefit of a lien which the creditor had upon the estate of his debtor.[6] So where an executor, who was also a devisee and legatee, died insolvent, having wasted a large portion of the estate, and leaving unpaid a debt of the testator and also a judgment against himself for his own debt, which judgment was a lien upon his interest as devisee in certain real estate of the testator, it was held that his co-devisees and legatees did not, by paying the debt of the testator, acquire a right over his interest in the real estate prior to the lien of his judgment-creditor, either by substitution to the claim of the creditor whom they had paid or by reason of the executor's waste.[1] But if a testator has bequeathed all his property to his widow in lieu of her dower, and she has as his executrix paid from the general assets notes given by him in payment for an estate which he had bought subsequently to the execution of his will, and which did not pass thereby, she will be subrogated for her reimbursement to a lien retained by the vendor upon the estate to secure to him the payment of these notes; and this right will pass to her devisee.[2] So if money of her husband's estate that should have been paid to her for her dower interest has been exhausted by the administrator in the payment of debts, she may be subrogated to the rights of the creditors who have thus been paid at her expense to hold the real estate for her reimbursement.[3]

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[1] McGee *v.* Wallis, 57 Miss. 638.

[2] Bennett *v.* Coldwell, 8 Baxter (Tenn.), 483; Hampton *v.* Nicholson, 23 N. J. Eq. 423; Neal *v.* Patten, 47 Ga. 73.

[3] Williams *v.* Stratton, 10 Sm. & M. (Miss.) 418. But see Weaver *v.* Norwood, 59 Miss. 665; Ebelmesser *v.* Ebelmesser, 99 Ills. 541.

[4] Place *v.* Oldham, 10 B. Mon. (Ky.) 400.

[5] Mitchell *v.* Mitchell, 8 Humph. (Tenn.) 359; Belcher *v.* Wickersham, 9 Baxter (Tenn.), 111; Alston *v.* Batchelor, 6 Ired. Eq. (Nor. Car.) 368.

[6] *Postea* § 240 *et seq.*

§ 211. **Subrogation in Favor of Specific Devisees and Legatees.** — The devisee of a tract of land which by direction of the testator had been levied upon in his lifetime to satisfy a debt of his own, and was still bound by the levy at the time of his death, is entitled after paying the debt, to be subrogated to the claim of the creditor against the personal assets of the estate;[4] and the lien-creditor of the devisee will have the same right of subrogation;[5] for, unless the will manifests a clear intention to the contrary,[6] it is the right of such devisee to have the testator's indebtedness paid out of the personal and undisposed-of assets of the estate,[7] though this

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[1] Wilkes *v.* Harper, 1 N. Y. 586.

[2] Durham *v.* Rhodes, 23 Md. 233.

[3] Cronch *v.* Edwards, 52 Ark. 499.

[4] Redmond *v.* Burroughs, 63 Nor. Car. 242.

[5] Morris *v.* Mowatt, 2 Paige (N. Y.), 586.

[6] Rogers *v.* Rogers, 1 Paige (N. Y.), 188; Brant's Will, 40 Mo. 266; Mirehouse *v.* Scaife, 2 Myl. & Cr. 695.

[7] Gould *v.* Winthrop, 5 R. I. 319; Plimpton *v.* Fuller, 11 Allen (Mass.),

§ 212. **Subrogation of Devisees to subsequently acquired Assets.** — Devisees who have lost the whole or part of the property devised to them by its being sold to pay the debts of the testator, in consequence of the insufficiency of the personal assets, will be subrogated to the rights of the creditors whom their property has thus satisfied, and entitled to reimbursement out of personal property subsequently discovered and received by the executors;[1] and such a devisee's right of subrogation will pass by an assignment of all his share and claim in and to the personal estate of the testator which then was in or might thereafter come into the hands of the executors, although not mentioned in the assignment, and not appearing to be then known to the assignor.[2] Accordingly, where a testator charged his personal estate with the payment of his debts, but, this being insufficient for that purpose, the testator's real estate, which had been devised, was sold to pay his debts, and afterwards the executors obtained a sum of money upon a claim which the testator had against the French government, it was held that this money was in equity to be considered a substitute for the real estate which had been sold for the payment of debts that were primarily chargeable upon the personal estate, and that in equity it must go exclusively to the devisees or their grantees, who were at the time of the sale the owners of the real estate that had been so sold, this money being regarded not as real estate, but as a fund to which they had an equitable right to compensate them for the loss of their land.[3] But creditors of such devisees, though having acquired a judgment-lien, can be subrogated to this right of the devisees only by bringing all parties before the court so that the rights of all may be properly protected.[4]

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[1] Couch *v.* Delaplaine, 2 N. Y. 397; Graham *v.* Dickinson, 3 Barb. Ch. (N. Y.) 169.

[2] Couch *v.* Delaplaine, *supra.*

[3] Graham *v.* Dickinson, *supra.*

[4] Evans *v.* Duncan, 4 Watts (Penn.), 24.

§ 213. **Rights of Heirs, Devisees, or Legatees against each other.** — If one of several devisees has lost the property devised to him by its being taken to pay a debt of the testator, he will be so far subrogated to the rights of the creditors whom he has thus been forced to satisfy, as to be entitled to a contribution to his loss from the other devisees;[1] and an heir will have the same right against the other heirs.[2] He will also be subrogated to the rights of the creditor against another debtor who was under a primary liability for the payment of the debt.[3] The different devisees, if there be a deficiency of assets, must contribute, to meet a charge upon all the estate devised, in proportion to the value of their respective interests,[4] as to make up an annuity to the testator's widow, or to pay debts of the testator which remain unsatisfied after the personal property and the undevised real estate have been exhausted.[5] A devisee whose estate has been taken for the dower of the testator's widow has the same right to contribution as if it had been taken for a debt of the testator.[6] A legatee who has advanced money to pay the testator's debts under the mistaken supposition that they were charged upon his property has been allowed to compel contribution from his co-legatees.[7] Where legacies and devises are put upon an equality, they are equally liable to contribution among themselves.[1] But a residuary devisee is not entitled to contribution from the other devisees,[2] though a somewhat modified rule has been laid down in England.[3] A devisee of land who has been obliged to pay a debt of the testator which was primarily charged upon the land devised to him cannot claim contribution therefor from other specific devisees or legatees.[4] In Mississippi it is said that the doctrine of the marshalling of assets does not apply to the case of specific legatees under a will when all the property bequeathed to them is subject to an incumbrance paramount to the will of the testator, and the property bequeathed to one of them has alone been seized to satisfy this incumbrance; and accordingly such a specific legatee will have no right to enforce contribution from his co-legatees, though their property was equally liable with his to the burden of the incumbrance,[5] thus leaving it to the caprice of the creditor to determine at whose expense he shall get his payment.[6] And, on the principle that no one can enjoy, by way of subrogation to a creditor, any greater rights than the creditor himself possessed,[7] it was held that where one died, leaving unincumbered real estate and also real estate subject to a mortgage by the terms of which the mortgagee could hold only the land for the satisfaction of his demand, and the mortgagor's heirs made partition among themselves of all his land in ignorance of the mortgage, the

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[1] Rhoads's Estate, 3 Rawle (Penn.), 420; Brigden *v.* Cheever, 10 Mass. 450; Armistead *v.* Dangerfield, 3 Munf. (Va.) 20; Foster *v.* Crenshaw, 3 Munf. (Va.) 514; Humphries *v.* Shaw, 63 Nor. Car. 341; Gallagher *v.* Redmond, 64 Tex. 622; Lancefield *v.* Iggulden, L. R. 10 Ch. 136.

[2] Winston *v.* McAlpine, 65 Ala. 377; Chaplin *v.* Sullivan, 128 Ind. 50; Falley *v.* Gribling, 128 Ind. 110; McPike *v.* Wells, 54 Miss. 136; Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419; *Tilghman, C. J.*, in Guier *v.* Kelly, 2 Binney (Penn.), 294, 299; Lyles *v.* Lyles, 1 Hill Eq (So. Car.) 77; Brinson *v.* Cunliff, 25 Tex. 760.

[3] Hancock *v.* Minot, 8 Pick. (Mass.) 29, 38.

[4] Harris *v.* White, 5 N. J. Law, 422; Mitchell *v.* Blain, 5 Paige (N. Y.), 588; Young *v.* Weldon, 1 Murph. (Nor. Car.) 176; Snow *v.* Callum, 1 Desaus. (So. Car.) 542.

[5] Tomlinson *v.* Bury, 145 Mass. 346; Harland *v.* Person, 93 Ala. 274; Livingston *v.* Livingston, 3 Johns. Ch. (N. Y.) 148.

[6] Gallagher's Appeal, 87 Penn. St. 200; Eliason *v.* Eliason, 3 Del. Ch. 260; Blaney *v.* Blaney, 1 Cush. (Mass.) 107.

[7] McCampbell *v.* McCampbell, 5 Litt. (Ky.) 92.

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[1] Powell *v.* Riley, L. R. 12 Eq. 175; Grim's Appeal, 89 Penn. St. 333; Dugan *v.* Hollins, 11 Md. 41; Hammond *v.* Hammond, 2 Bland, Ch. (Md.) 306; Brant's Will, 40 Mo. 266.

[2] Richardson *v.* Hall, 124 Mass. 228, 233; Blaney *v.* Blaney, 1 Cush. (Mass.) 107; McMullin *v.* Brown, 2 Hill Eq. (So. Car.) 457.

[3] Lancefield *v.* Iggulden, L. R. 10 Ch. 136. See Spong *v.* Spong, 3 Bligh, N. S. 84; Hensman *v.* Fryer, L. R. 3 Ch. 420; s. c., L. R. 2 Eq. 627.

[4] Hocker's Appeal, 4 Penn. St. 497; Graves *v.* Graves, 106 Ind. 118.

[5] Peeples *v.* Horton, 39 Miss. 406.

[6] *Antea*, § 172 *et seq.*; Wright, *in re*, 16 Fed. Rep. 482. And see 1 Story Eq., § 493.

[7] *Antea*, § 6.

himself provided for the protection of his interest.[1] The expenses of a necessary litigation will be thrown upon the whole fund which reaps the benefit thereof.[2]

§ 215. **Rights of Heirs among Themselves.** — If some of the heirs of an intestate held a mortgage upon his real estate to secure the payment of a debt due to them from him, and in order to prevent a sale of his real estate by his administratrix give bond for the payment of his debts, though they will thereby discharge the lien of their mortgage as a security for the debt due to themselves,[3] they may nevertheless hold the mortgaged premises against the other heirs as if the mortgage still subsisted, until these other heirs shall contribute their respective shares of the mortgage-debt.[4] If exempt property is sold by the administrator to pay debts, the heir is entitled to be reimbursed from such other property as is not subject to prior liens;[5] and if debts which were chargeable upon the personal property have been paid out of the real estate, the heir may, as against the distributees, be subrogated to the rights of the creditors upon the personal estate;[6] but he will not be so subrogated against the devisees to reimburse him for debts which he has paid out of his own pocket as a mere bounty.[7]

§ 216. **Rights of Purchaser from Heir or Devisee.** — If the purchaser from an heir-at-law of a portion of the real estate descended to the latter subsequently loses the land which he has purchased, by its being sold to pay the debts of the ancestor, such purchaser will have an equitable lien upon the residue of the property remaining in the hands of the heir for his reimbursement: such a purchaser, as to the land remaining in the possession of the heir, stands in the position of a surety, and will be subrogated to the rights of the creditor whom his property has satisfied, as if he were a surety.[1] And if successive conveyances of lands have been made by an heir, or by a devisee thereof charged with the payment of debts or legacies; the lands thus conveyed are, in the hands of the purchasers thereof, liable among themselves to be resorted to for the payment of such debts or legacies in the inverse order of their alienation, the portion, if any, remaining in the hands of such heir or devisee being first taken, then the portion last conveyed by him, and so on.[2] In the same way *bona fide* purchasers of the property of the testator from executors who have power to sell the same will be protected from debts of the testator which are liens upon the purchased property, by compelling the executors, if they have assets, to pay such debts.[3]

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[1] Thirlwell *v.* Campbell, 11 Bush (Ky.), 163.

[2] Florida Internal Improvement Co. *v.* Greenough, 12 Amer. & English R. R. Cas. 345.

[3] Robinson *v.* Leavitt, 7 N. H. 73.

[4] Jenness *v.* Robinson, 10 N. H. 215.

[5] McDougall *v.* Brokaw, 22 Fla. 98.

[6] Phipps *v.* Phipps, 3 Pa. Law Journal Rep. 275. So if the payment was made by the widow from her own means: McNally *v.* Weld, 30 Minn. 209. See also Deichman *v.* Arndt, 22 Atl. Rep. 799; Adams *v.* Smith, 20 Abbott, New Cas. (N. Y.) 60.

[7] Coleby *v.* Coleby, L. R. 2 Eq. 803.

§ 217. **Creditors subrogated to the Rights of Legatees.**—If a testator charges one estate with the payment of his debts, and another with the payment of legacies, and the legacies are paid out of the proceeds of the former estate, the creditors will be subrogated to the rights of the legatees against the latter estate, in the hands of a purchaser thereof who had constructive notice of the terms of the will; and sureties who have satisfied the creditors will have the same right which the creditors might have exercised.[4] "The legatees," said Moncure, P.,[5] "having received payment out of the fund which belonged to the creditors, the latter had a clear and plain right to compel the former to refund the money, so far as it was necessary for the payment of debts. And the legatees, being thus disappointed in obtaining satisfaction out of the fund which belonged to the creditors, would have as clear and plain a right to be reinstated in their charge upon the home place, and to be satisfied out of the same. But to avoid circuity, a court of equity will subrogate the creditors to the place of the legatees, and give the former a direct decree against the home place." So, where an executor who was also a trustee under the will applied the funds of the estate which should have been used to meet the testator's debts to pay charges which constituted a superior lien upon the trust property, it was held that equity would give the general creditors a charge upon the trust property to the extent of such payments.[1]

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[1] Eddy *v.* Traver, 6 Paige (N. Y.), 521.

[2] Jenkins *v.* Freyer, 4 Paige (N. Y.), 47; Livingston *v.* Freeland, 3 Barb. Ch. (N. Y.) 510; Conover *v.* Conover, 1 N. J. Eq. (Saxton) 403; Lewis *v.* Overby, 31 Gratt. (Va.) 601; Nellons *v.* Truax, 6 Ohio St. 97; Ireland *v.* Miller, 71 Mich. 119; Finch *v.* Shaw, 19 Beav. 500; *antea*, § 75 *et seq.*

[3] Latrobe *v.* Tierman, 2 Md. Ch. Dec. 474.

[4] Burwell *v.* Fauber, 21 Gratt. (Va.) 446.

[5] In Burwell *v.* Fauber, *supra.*

§ 218. **Subrogation of Devisee or Legatee who is disappointed by the Election of another.** — Beneficiaries under a will who have, by the election of another legatee, been disappointed of what they would otherwise have received, will be allowed compensation for their loss out of what the latter would by a different election have taken under the will.[2] If a legatee under a will which devises away property belonging to himself elects to retain his own property and to waive the legacy, the testator will not be thereby rendered intestate, or the share of the residuary legatees, not being the parties disappointed in consequence of the election, increased, as to the subject-matter of such legacy, but it will go to the disappointed devisee, so far as is necessary to the satisfaction of his loss.[3] So, if a testator bequeaths the income of certain

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[1] Ferris *v.* Van Vechten, 9 Hun (N. Y.), 12.

[2] Pickersgill *v.* Rodger, 5 Ch. Div. 163; Wilkinson *v.* Dent, L. R. 6 Ch. 339, 341; Reeve *v.* Reeve, 1 Vern. 219; Welby *v.* Welby, 2 Ves. & B. 187, 190; Bor *v.* Bor, 3 Bro. P. C. 167; Dean *v.* Hart, 62 Ala. 308; Key *v.* Griffin, 1 Rich. Eq. (So. Car.) 67; Timberlake *v.* Parish, 5 Dana (Ky.), 345.

[3] Hamilton *v.* Hamilton, 1 Ch. D. (1892) 396; Ker *v.* Wauchope, 1 Bligh, 1; Gilman *v.* Gilman, 111 N.

a person who disappoints another by electing to take under the instrument which gives rise to the election.[1]

§ 219. **Extent of this Right of Substitution.** — The substitution of the disappointed beneficiaries to the rights of the legatee or devisee whose election has caused the disappointment will, if necessary, be to the extent of the rights which were given by the will to the party making the election,[2] but it can be carried no further.[3] If the widow of a testator who has by his will, after various absolute devises and bequests, bequeathed the income of a certain fund to his wife for her life, with remainder to be distributed among various legatees, and given the residue of his estate to his residuary devisees, elects to take her statutory rights as widow in his estate instead of the provision made for her in his will, and thus diminishes the share of the residuary legatees, these legatees will, during the lifetime of the widow, by substitution to her rights, be entitled to receive the income of the fund provided for her, and after her death the fund will go to the legatees named in the will, as if her election had operated no change in carrying out the intentions of the testator.[4] The purchaser from a devisee of certain cottages in which the testator had only a life-estate, the remainder being in his wife, will be entitled to compensation from the estate of the testator's wife, for her selling the cottages, to the extent of the benefit taken by the wife under the will, the testator having given all his estate to his wife for her life, and these cottages after her death to such purchaser's grantor.[5] A testator, having charged certain lands with a portion for his daughter by his first wife, afterwards settled a portion of the same lands as a jointure upon his second wife, who had no notice of the prior charge. Believing that the charge would have preference over the jointure, he then devised other lands to his wife, in lieu of the jointure. After his death, the wife, finding that her jointure was good against the charge for the daughter's portion, because the latter was merely voluntary, agreed with the heir to waive her devise, and claim the jointure, for the purpose of depriving the daughter of her portion. But the court decreed that the daughter should have the lands devised to the wife, until her portion was made up.[1]

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[1] Chesham, *in re*, 31 Ch. D. 466.

[2] Rogers *v.* Jones, 3 Ch. Div. 688; Maskell *v.* Goodall, 2 Disney (Ohio), 282; Tiernan *v.* Roland, 15 Penn. St. 430, 451.

[3] Gretton *v.* Haward, 1 Swanst. 409; Upham *v.* Emerson, 119 Mass. 509; Sandoe's Appeal, 65 Penn. St. 314; Stump *v.* Findlay, 2 Rawle (Penn.), 168.

[4] Firth *v.* Denny, 2 Allen (Mass.), 468; Brandenburg *v.* Thorndike, 139 Mass. 102.

[5] Rogers *v.* Jones, 3 Ch. Div. 688.

§ 220. **This does not extend to a Devise merely upon Condition.** — If property is devised to one upon a condition with which he fails to comply, and thus waives his right to the devise, the performance of this condition by a stranger will not substitute the stranger to the rights of the devisee.[2] Thus, where a testator devised land to one of his sons on condition that the devisee should support a second son during his life, but the devisee refused to accept the devise and did not support the second son, and a stranger, having been appointed guardian of the latter, advanced out of his own means money for his support, to an amount equal to the value of the estate so devised, it was held that these advances could not rightfully be reimbursed out of the devised estate, but that, on the refusal of the original devisee to accept the same, it descended to the testator's heirs-at-law, free of any charge thereon;[3] but elsewhere the right of a party furnishing support to the beneficiary of such a conditional devise or conveyance to be subrogated to the title of the devisee has been affirmed.[1] If a person to whom land is devised, on condition of his releasing a debt due to him from the testator, receives payment of the debt, he relinquishes the land; and the fact that he receives such payment from a stranger gives the latter no title to the land.[2] But if the money so paid by such stranger was the full value of the property, and immediately upon its payment he took possession of the land, and was suffered by all the heirs to hold possession, they knowing and acquiescing in his payment, and he incurred expense to make improvements, it has been intimated that equity would order the land to be conveyed to him, especially if the title was one which was then governed as to its transmission by the same rules as personal property.[3] And a devise of land on condition that the devisee shall pay certain specified debts and legacies creates a charge upon the land, to the exoneration of the personal property bequeathed by the will, although the devise be not accepted.[4]

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[1] Reeve *v.* Reeve, 1 Vern. 219, recognized by *Lord Hardwicke*, in Lanoy *v.* Athol, 2 Atk. 447.

[2] Temple *v.* Nelson, 4 Met. (Mass.) 584; Frederick *v.* Gray, 10 Serg. & R. (Penn.) 182; Bugbee *v.* Sargent, 23 Maine, 269; Box *v.* Barrett, L. R. 3 Eq. 244.

[3] Temple *v.* Nelson, *supra;* Halstead *v.* Westervelt, 41 N. J. Eq. 100; Savage *v.* McCorkle, 17 Oreg. 42.

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[1] Ferre *v.* American Board, 53 Vt. 162; McArthur *v.* Gordon, 126 N. Y. 597; Huffmond *v.* Bence, 128 Ind. 131; Scott *v.* Hillenburg, 85 Va. 245. Some of these were cases of conveyances in which the consideration was a promise to give such support, or in which a lien was reserved or created therefor, to which subrogation might well be made; they were not upon a bare condition.

[2] Frederick *v.* Gray, 10 Serg. & R. (Penn.) 182. See also King *v.* Morris, 2 B. Mon. (Ky.) 99.

[3] Frederick *v.* Gray, *supra.*

[4] McFait's Appeal, 8 Penn. St. 290; Birdsall *v.* Hewlett, 1 Paige (N. Y.), 32; Bugbee *v.* Sargent, 27 Maine, 338; s. c., 23 Maine, 269.

form of an abandonment will have the same effect.[1] "The law gives to the act of abandonment, when accepted, all the effects which the most carefully drawn assignment would accomplish. By the act of abandonment the insured renounces and yields up to the underwriter all his right, title, and claims to what may be saved, and leaves it to him to make the most of it for his own benefit. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be saved from destruction."[2] The insurers are entitled, upon settlement as for a total loss, to be subrogated for their own benefit to any rights of action of the insured against a third party for his negligence or wrongdoing causing the loss.[3] Nor can such third party in an action brought against him in the name of the insured set up the insurers' payment to the plaintiff as a defence, either wholly or *pro tanto.*[4] The abandonment has a retroactive effect, and vests in the insurers the title to the property or its proceeds from the time of the injury or loss as fully as if it had been the subject of a bill of sale.[5] The property vests in the insurers, with its benefits as well as its burdens,[6] if the abandonment has been rightfully made, though the loss has not been actually paid.[7]

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[1] Dufourcet *v.* Bishop, 18 Q. B. D. 373; Holbrook *v.* United States, 21 Ct. of Claims, 434.

[2] *Story, J.*, in Comegys *v.* Vasse, 1 Peters, 193; Simonds *v.* Union Ins. Co., 1 Wash. C. C. 443.

[3] The City of Paris, 1 Benedicts, 529; Home Ins. Co. *v.* Western Transportation Co., 4 Robt. (N. Y.) 257; Mercantile Ins. Co. *v.* Clark, 118 Mass. 288; Georgia Ins. Co. *v.* Dawson, 2 Gill (Md.), 365; The Thyatira, 8 Prob. D. 155; Dickenson *v.* Jardine, L R 3 C. P. 639; Randal *v.* Cockran, 1 Ves. Sen. 98; North of England Ins. Association *v.* Armstrong, L. R. 5 Q. B. 244.

[4] Clark *v.* Wilson, 103 Mass. 219. The opinion of the court in this case, by Mr. Justice Gray, contains an exhaustive discussion of the question involved, both upon principle and upon authority.

[5] Sun Ins. Co. *v.* Hall, 104 Mass. 507; Union Ins. Co. *v.* Burrell, Anth. Cas. (N. Y.) 176; United Ins. Co. *v.* Scott, 1 Johns. (N. Y.) 106.

[6] Frothingham *v.* Prince, 3 Mass. 563; Sun Ins. Co. *v.* Hall, 104 Mass. 507; Heilner *v.* China Ins. Co., 18 N. Y. Supt. 177.

[7] Rogers *v.* Hosack, 18 Wend. (N. Y.) 319.

§ 222. **Subrogation to the Remedy for a Tort causing the Loss.** — Accordingly the right of a ship-owner to indemnity for an unjust capture will pass by his abandonment to the insurers of the ship,[1] and on the latter's bankruptcy will vest in their assignees.[2] The insurers of a ship which has been run down and sunk by the fault of another ship are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel,[3] and will be entitled to any damages which the insured may have recovered from such owners; and if their policy was a valued one, their payment of this value will give to them the whole *spes recuperandi* and the right to the whole damages, though the insured vessel was in fact worth a larger sum than the valuation named in the policy, this valuation being conclusive between the insurers and the insured.[4] Accordingly, the defendants in an action to recover for the damage done to the plaintiff's ship by a collision cannot deduct from the damages to be paid by them the amount that has been paid to the plaintiff for the same injury by insurers of the ship; the plaintiff is entitled to recover as to this amount as a trustee for the insurers.[5] So, too, if the insurers of goods have stipulated to answer for a loss by theft, and the master and ship-owners are also liable for this loss, the insurers, upon a loss by theft and an abandonment to them or their payment of a total loss, will be entitled to be subrogated to the remedy of the insured therefor against the master and ship-owners; and if the insured destroys this remedy after his recovery of judgment against the insurers, equity will relieve the latter *pro tanto* from this judgment.[6] And as the master or ship-owners would have no right to claim from the owners of the goods contribution for such a loss, the policy cannot, upon their satisfying the insured, be legally assigned for their benefit so as to enable them to recover from the insurers.[1] Insurers will, upon satisfying a judgment recovered against them for the total loss of a vessel occasioned by the barratry of its master, be subrogated to the benefit of a judgment obtained by the insured against the master for the same loss, although they have, while the action against the master was pending, refused an offer of the insured to transfer the control of that action to them, upon condition that they should pay the expenses already incurred therein, and that the transfer should not prejudice any rights of the insured.[2]

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[1] Monticello *v.* Mollison, 17 Howard, 152.

[2] Comegys *v.* Vasse, 1 Peters, 193.

[3] The Potomac, 105 U. S. 630; The Planter, 2 Woods, C. C. 490.

[4] North of England Ins. Association *v.* Armstrong, L. R. 5 Q. B. 244.

[5] Yates *v.* Whyte, 4 Bing. New Cas. 272, following Mason *v.* Sainsbury, 3 Doug. 61.

[6] Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.), 285. See Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86.

§ 223. **Limitations of this Subrogation.** — This subrogation of the insurers to the remedy against a wrong-doer who has caused the loss which the insurers have satisfied is only to the remedies and rights of action which were vested in the insured, or which the insured have succeeded in obtaining from the party at fault,[3] subject to all the liabilities and duties which rested on the insured,[4] even in favor of third parties;[5] it is not an independent right of action in the insurers themselves,[6] and will not be subject to any personal estoppel existing against the insurers in their own right.[7] The insurers succeed merely to the means of redress which were possessed by the party whom they have indemnified against the party whose wrongful act caused the loss.[8] Accordingly, where two ships belonging to the same owner came

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[1] Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.), 285.

[2] Mercantile Ins. Co. *v.* Clark, 118 Mass. 288.

[3] New England Ins. Co. *v.* Dunham, 3 Clifford, C. C. 332; Alliance Ins. Co. *v.* Louisiana Ins. Co., 8 La. 1.

[4] Wilson *v.* Raffalovich, 7 Q. B. D. 553; The Bristol, 29 Fed. Rep. 867.

[5] Rice *v.* Cobb, 9 Cush. (Mass.) 302.

[6] Alliance Ins. Co. *v.* Louisiana Ins. Co., 8 La. 1.

[7] Williams *v.* Hays, 64 Hun (N. Y.), 202.

[8] Magdeburg Ins. Co. *v.* Paulson, 29 Fed. Rep. 530; The Sam Brown, *Id.* 650, which was a case of collision.

must pay it over to them.[1] And if, under such circumstances, the insured should, after their compromise with the underwriters, receive full compensation for their loss from the parties at fault therefor, the underwriters would not be entitled to any part of this compensation.[2]

§ 225. **Effect of an Abandonment.** — After an abandonment, if it is a legal one, or if it is accepted, the insurers stand in the place of the insured, and the former agents of the insured become the agents of the insurers.[3] The master of the ship becomes the agent or servant of the insurers, and is answerable to them for his neglect or misconduct.[4] The consignee of goods insured becomes by the abandonment the agent of the insurers; and his acts done in good faith are at their risk and for their benefit.[5] An agent appointed by the insured after a capture to prosecute his claim becomes, after an abandonment, the agent of the insurers; and such agent's receipts of the proceeds of a sale of the captured property will be deemed to be a receipt thereof by the insurers, who must look to the agent for the amount, and pay to the insured the full amount of the loss, without any deduction therefor.[6] The wages of the crew, after an abandonment, will be chargeable to the insurers, not as insurers, but as owners of the ship.[1] Any purchase made by the insured or his agents of the abandoned property which has been paid for by the insurers will be taken to have been made for the benefit of the insurers.[2] And the insurers, as owners of the ship, will be entitled to its earnings, if any are made after the abandonment.[3] But since the earnings of the ship up to the time of the abandonment belong to the insured as its owner,[4] if the owner of ship and goods rightfully abandons both to the underwriters as for a total loss by perils insured against, and part of the goods are saved, the insurers as owners of the goods will be liable to the insured as owners of the ship for freight *pro rata itineris* until the abandonment.[5] The freight earned before and after the abandonment will be apportioned, so as to give to each party, the insured and the insurers, the earnings of the ship during the respective periods of their ownership thereof.[6]

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[1] New York Ins. Co. *v.* Roulet, 24 Wend. (N. Y.) 505.

[2] Brooks *v.* McDonnell, 1 Yo. & Co. Ex. 500.

[3] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268; Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400; Mutual Ins. Co. *v.* Cargo, Olcott, Adm. 89; Peirce *v.* Ocean Ins. Co., 18 Pick. (Mass.) 83; Badger *v.* Ocean Ins. Co., 23 Pick. (Mass.) 347; Gardiner *v.* Smith, 1 Johns. Cas. (N. Y.) 141; Curcier *v.* Phila. Ins. Co., 5 Serg. & R. (Penn.) 113; Cincinnati Ins. Co. *v.* Duffield, 6 Ohio St. 200; Norton *v.* Lexington Ins. Co., 16 Ills. 235; Gould *v.* Citizens' Ins. Co., 13 Mo. 524; Phillips *v.* St. Louis Ins. Co., 11 La. Ann. 459; Graham *v.* Ledda, 17 La. Ann. 45; Heilner *v.* China Ins. Co., 18 N.Y. Supt. 177.

[4] The Sarah Ann, 2 Sumner, 206; Mowry *v.* Charleston Ins. Co., 6 Rich. Law (So. Car.), 146; Jumel *v.* Marine Ins. Co., 7 Johns. (N. Y.) 412; Gardere *v.* Columbian Ins. Co., 7 Johns. (N. Y.) 514.

[5] Gardiner *v.* Smith, 1 Johns. Cas. (N. Y.) 141; Schmidt *v.* United Ins. Co., 1 Johns. (N. Y.) 249.

[6] Miller *v.* De Peyster, 2 Caines (N. Y.), 301.

§ 226. **Abandonment of Ship and Freight separately insured.** — If the owner of a ship has effected separate insurances upon ship and freight, and afterwards rightfully abandons both to the underwriters upon them respectively, the doctrine generally adopted in this country is that he is entitled to recover for a total loss of both,[7] and that the freight earned prior to the loss goes to the ship-owner, or to his representatives, the insurers of the freight, to whom it has been abandoned, while the freight, if any, earned subsequently to the loss which has caused the abandonment goes to the insurers of the ship, who have by the abandonment become its owners.[1] The abandonment of the vessel to the insurers thereof will not preclude the insured from recovering upon the policy on the freight.[2] Accordingly, if a ship-owner, having insured the ship and the freight separately with two sets of insurers, upon a capture of the ship abandons the ship to the insurers of the ship, and the freight to the insurers of the freight, and then takes from the insurers of the ship half of his claim in cash, and for the other half an assignment of their interest in the ship, he will be entitled to the freight which would otherwise have been theirs, and may recover from the insurers of the freight to the full amount of their policy, deducting only the *pro rata* freight which had been earned before the abandonment.[3]

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[1] McBride *v.* Marine Ins. Co., 7 Johns. (N. Y.) 431; Frothingham *v.* Prince, 3 Mass. 563.

[2] United Ins. Co. *v.* Robinson, 2 Caines (N. Y.), 280.

[3] McBride *v.* Marine Ins. Co., 7 Johns. (N. Y.) 431; Stewart *v.* Greenock Ins. Co., 2 Ho. Lds. 159; Miller *v.* Woodfall, 8 El. & Bl. 493.

[4] Miller *v.* Woodfall, 8 El. & Bl. 493.

[5] Teasdale *v.* Charleston Ins. Co., 2 Brev. (So. Car.) 190.

[6] Kennedy *v.* Baltimore Ins. Co., 3 Harris & J. (Md.) 367.

[7] Coolidge *v.* Gloucester Ins. Co., 15 Mass. 341.

§ 227. **English Doctrine.** — In England, as in the United States, freight earned subsequently to the loss by reason of which the abandonment is made goes to the insurers as owners of the ship.[4] If, after the disaster and abandonment, the cargo is transshipped and carried by another vessel to the port of destination, and the freight is thus earned, this will not be for the benefit of the insurers of the ship,[5] nor will they be entitled to damages for the loss of this freight from a wrong-doer who has caused such loss.[6] But if, after the loss which is the cause of the abandonment, the original ship proceeds on her voyage, and earns the pending freight, both the vessel and the freight being separately insured, the title to the whole freight is vested by the abandonment in the insurers of the ship;[7] and, the freight having been earned in accordance with the true interpretation of the

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[1] Marine Ins. Co. *v.* United Ins. Co., 9 Johns. (N. Y.) 186; Davy *v.* Hallett, 3 Caines (N. Y.), 16; Hammond *v.* Essex Ins. Co., 4 Mason, C. C. 196.

[2] Livingston *v.* Columbian Ins. Co., 3 Johns. (N. Y.) 49.

[3] Davy *v.* Hallett, 3 Caines (N. Y.), 16.

[4] Luke *v.* Lyde, 2 Burr. 882.

[5] Hickie *v.* Rodocanachi, 4 Hurlst. & Nor. 455.

[6] Sea Ins. Co. *v.* Hadden, 13 Q. B. D. 706.

[7] Stewart *v.* Greenock Ins. Co., 2 Ho. Lds. 159; Davidson *v.* Case, 8 Price, Exch. 542; s. c., 5 J. B. Moore, 116; s. c., in Exch. Chamber, 2 Brod. & B. 379.

formance of duty.[1] Nor can the carrier raise the question whether the insurers were bound under the policy to indemnify the insured for the loss sustained.[2] If the insured, by his act and contrary to the terms of the policy, defeats this right of the insurers to be subrogated, the insurers' liability will be terminated.[3] "Standing, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be destroyed or injured in consequence of the perils insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable.[4] It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has been often ruled that an insurer who has paid a loss may use the name of the insured in an action to obtain redress from the carrier whose failure of duty caused the loss.[5] It is conceded that this doctrine prevails in cases of marine insurance; but it is denied that it is applicable to cases of fire insurance upon land; and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by the abandonment of the insured, while in land policies there can be no abandonment. But it is a mistake to suppose that the right of insurers in marine policies to proceed against a carrier of goods after they have paid a total loss grows wholly or even principally out of any abandonment. There can be no abandonment where there has been total destruction; there is nothing upon which it can operate; and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance[1] that the payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss, and that the effect of a payment of a loss is equivalent in this respect to that of an abandonment.[2] There is then no reason for the subrogation of insurers by marine policies to the rights of action of the insured against a carrier by sea which does not exist in support of a like subrogation in cases of insurance against fire upon land. Nor do the authorities make any distinction between the cases."[3] A marine insurer in such a case may in admiralty bring a libel against the carrier in his own name,[4] but at law the remedy of fire insurers against the carrier must be pursued in the name of the insured,[5] and is subject to all defences which might be made against the insured;[6] and the carrier may destroy the insurer's right by stipulating with the owner of the goods for the benefit of any insurance to be obtained by the owner against loss or damage to the goods for which the carrier would be liable.[7]

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[1] Mobile R. R. Co. *v.* Jurey, 111 U. S. 584; Hall *v.* Nashville & Chatt. R. R. Co., 13 Wallace, 367; Gales *v.* Hailman, 11 Penn. St. 515.

[2] The Amazon Ins. Co. *v.* The Iron Mountain, 1 Flippin, C. C. 616; Sun Ins. Co. *v.* Mississippi Valley Co., 17 Fed. Rep. 919; Pearse *v.* Quebec Steamship Co., 24 Fed. Rep. 285.

[3] Carstairs *v.* Mechanics Ins. Co., 18 Fed. Rep. 473; Fayerweather *v.* Phœnix Ins. Co., 118 N. Y. 324; Ins. Co. of North America *v.* Easton, 73 Tex. 167.

[4] Sun Ins. Co. *v.* Kountz Line, 122 U. S. 583; Hibernia Ins. Co. *v.* St. Louis Transportation Co., 10 Fed. Rep. 596; Lancaster Mills *v.* Merchants' Cotton-Press Co., 89 Tenn. 6; Railway Co. *v.* Manchester Mills, 88 Tenn. 653.

[5] This has been denied in one case, and it is believed in only one; and in that case no authority was cited for the conclusion adopted, and two judges dissented: Carroll *v.* New Orleans R. R. Co., 26 La. Ann. 447.

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[1] Section 1723.

[2] Mobile R. R. Co. *v.* Jurey, 111 U. S. 584; The Sydney, 27 Fed. Rep. 119; Pearse *v.* Quebec Steamship Co., 24 Fed. Rep. 285; The Frank G. Fowler, 8 *Id.* 360.

[3] *Strong, J.*, in Hall *v.* Nashville, & Chatt. R. R. Co., 13 Wallace, 367.

[4] Amazon Ins. Co. *v.* The Iron Mountain, 1 Flippin, C. C. 616; The Liberty, 7 Fed. Rep. 226.

[5] Hall *v.* Nashville & Chatt. R. R. Co., *supra;* Brighthope Railw. Co. *v.* Rogers, 76 Va. 443; Mercantile Ins. Co. *v.* Calebs, 20 N. Y. 173; Gales *v.* Hailman, 11 Penn. St. 515; Georgia Ins. Co. *v.* Dawson, 2 Gill (Md.), 365.

[6] Hibernia Ins. Co. *v.* St. Louis Transportation Co., 120 U. S. 166, and 17 Fed. Rep. 478; The Frederick E. Ives, 25 Fed. Rep. 447; The B. B. Saunders, *Id.* 727; Germania Ins. Co. *v.* Memphis R. R. Co., 72 N. Y. 90.

[7] Inman *v.* So. Car. Ry. Co., 129 U. S. 128; Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S. 312, affirming s. c., 10 Biss. 18; The Sydney, 27 Fed. Rep. 119; Rintoul *v.*

But the provision in a bill of lading that no damage that can be insured against will be paid for is not such a stipulation, and will not affect the rights of the insurer,[1] which are not to be taken away by implication.[2] Nor will the insurers be subrogated to any right of action which the insured may have against a third party for a breach of the latter's agreement to carry insurance on the property.[3]

§ 230. **Insurer against Fire subrogated to Remedy against Railroad.** — The insurers against fire of property which has been destroyed by fire communicated from a locomotive engine will, upon payment for the loss, be subrogated, to the extent of their payment, to the remedies of the insured, as the owners of the property insured and destroyed, against the railroad company for the loss.[4] But this remedy must also, like that against a carrier, be prosecuted at law in the name of the insured, since the right of action was already vested in the latter before the payment by the insurers,[5] except under those reformed codes of procedure which permit any action to be brought in the name of the real party in interest.[6] But since the insurers take by subrogation only the rights of the insured, and the action for a single tort is

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N. Y. Central R. R. Co., 20 *Id.* 313 and 17 *Id.* 905; Jackson Co. *v.* Boylston Ins. Co., 139 Mass. 508; Platt *v.* Richmond R. Co., 108 N. Y. 358; Mercantile Ins. Co. *v.* Calebs, 20 N. Y. 173; Gulf, Colorado, & Santa Fe Ry. Co. *v.* Zimmerman, 81 Tex. 605; British Ins. Co. *v.* Gulf, &c. Co., 63 Tex. 475.

[1] The Hadji, 22 Blatchf. C. C. 235; s. c., 20 Fed. Rep. 875; 16 *Id.* 861.

[2] Phœnix Ins. Co. *v.* Liverpool Steamship Co., 22 Blatchf. C. C. 372; The Montana, 22 Fed. Rep. 715, and 17 *Id.* 377.

[3] Deming *v.* Merchants' Cotton-Press Co., 90 Tenn. 309.

[4] Hart *v.* Western R. R. Co., 13 Met. (Mass.) 99; Conn. Ins. Co. *v.* Erie Railw. Co., 73 N. Y. 399; Monmouth Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

[5] Swarthout *v.* Chicago R. R. Co., 49 Wisc. 625; Holcombe *v.* Richmond & Danville R. R. Co., 78 Ga. 776; Peoria Ins. Co. *v.* Frost, 37 Ills. 333; Hart *v.* Western R. R. Co., 13 Met. (Mass.) 99; Ætna Ins. Co. *v.* Hannibal & St. Joseph R. R. Co., 3 Dillon, C. C. 1.

[6] Conn. Ins. Co. *v.* Erie Railw. Co., 73 N. Y. 399; Hustisford Ins. Co. *v.* Chicago Railw. Co., 66 Wisc. 58; Swarthout *v.* Chicago & N. W. R. R. Co., 49 Wisc. 625; Railw. Co. *v.* Fire Association, 55 Ark. 164.

amount in satisfaction of his damages, he holds this in trust for the insurers, and they may recover it from him by a suit in equity; and if the railroad company has not paid the insured his damages, or has paid them knowing that the insured has already received his payment from the insurance company, the latter may maintain a suit at law against the railroad company in the name of the insured, even against his consent, to compel repayment of the damages to the amount of their payment; and a release given by the insured to the railroad company would be no defence to this suit. But these two remedies cannot be pursued on a single bill in equity; neither the insured nor the railroad company is a necessary party to the suit against the other; they are not jointly liable, and no judgment could be rendered or decree made against both. The insurers may, however, before beginning their suit against the railroad company, bring a bill in equity to have a release given by the insured to the railroad company, when the latter knew of the payment by the insurers, declared void as a fraud upon their rights; and to this bill both the insured and the railroad company would be proper parties.[1]

§ 232. **Subrogation against other Parties liable for a Loss by Fire.** — In like manner the insurers of a building, which has been burned in such a manner as to create a liability therefor in a muncipality or in other parties at fault, cannot, upon their payment of a loss, maintain in their own names an action therefor against the parties ultimately responsible for the loss,[2] but may do so in the names of the insured owners of the property, whom they have indemnified.[3] The insurer takes by substitution all the rights and remedies of the insured;[4] and under some of the reformed codes of procedure, though not at common law, may after full payment maintain action thereon in their own names.[1] The payment by the insurers will be no defence in an action brought by the owner of the property against the party who is answerable for the loss, either in bar of the action or in mitigation of damages.[2] The insurers' payment gives them by subrogation an equitable interest in the claim against the wrong-doer.[3] But this subrogation of the insurers is strictly limited to the existing rights of the insured,[4] and is subject to the right of the owner to be fully compensated for the loss of his property;[5] if he has obtained a partial indemnity from a municipality whose liability is less extensive than that of the insurers, this will be a defence only *pro tanto* to the insurers; they will still be liable to him within the limits of their policy for the amount of his loss, deducting therefrom the net proceeds of his recovery against the municipality.[6] And if the insured owner of the property, after receiving payment of the insurance, is fully indemnified for his loss by the wrong-doer or from the latter's means, he must then account to the insurers for what they had previously paid him;[7] the insurers' liability is merely a secondary one.[8] On the same principle, where a building which was insured against fire, but not to its full value,

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[1] Monmouth Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

[2] London Ass. Co. *v.* Sainbury, 3 Doug. 245; Rockingham Ins. Co. *v.* Bosher, 39 Maine, 253.

[3] Mason *v.* Sainsbury, 3 Doug. 61.

[4] Burnand *v.* Rodocanachi, 7 App. Cas. 333, 339; Castellain *v.* Preston, 11 Q. B. D. 380, reversing s. c., 8 *Id.* 613; Niagara Ins. Co. *v.* Fidelity Ins.

Co., 123 Penn. St. 516; Home Ins. Co. *v.* Oregon Ry. & Nav. Co., 20 Oreg. 569.

[1] Marine Ins. Co. *v.* St. Louis Ry. Co., 41 Fed. Rep. 643.

[2] Clark *v.* Blything, 2 Barn. & Cress. 254; Perrott *v.* Shearer, 17 Mich. 48; Cunningham *v.* Evansville R. R. Co., 102 Ind. 478; Weber *v.* Morris & Essex R. R. Co., 35 N. J. Law, 409; Hayward *v.* Cain, 105 Mass. 213; Harding *v.* Townshend, 43 Vt. 536.

[3] Castellain *v.* Preston, 11 Q. B. D. 380; Chicago, St. Louis & N. O. R. Co. *v.* Pullman Car Co., 139 U. S. 79; Pratt *v.* Radford, 52 Wisc. 114.

[4] St. Louis & Iron Mountain R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223.

[5] Home Ins. Co. *v.* Oregon Ry. & Nav. Co., 20 Oreg. 569; People's Ins. Co. *v.* Straehle, 2 Cincinnati Sup. Ct. 186; Newcomb *v.* Cincinnati Ins. Co., 22 Ohio St. 382.

[6] Pentz *v.* Ætna Ins. Co., 9 Paige (N. Y.), 568.

[7] Darrell *v.* Tibbetts, 5 Q. B. Div. 560.

[8] Friemandorf *v.* Watertown Ins. Co., 9 Biss. C. C. 167; Hardman *v.* Brett, 37 Fed. Rep. 803; Fidelity Title Co. *v.* People's Gas Co., 150 Penn. St. 8.

had been burned through the fault of a municipality, and the owner had brought an action therefor against the municipality, and undertook to sue for the whole damage, as he may do,[1] he was allowed to conduct the action without the interference of the insurers, though he would be liable to the insurers for anything that he might do in violation of his equitable duty towards them.[2] So he could release the wrong-doer from liability for any injuries not covered by the insurance.[3] By the civil law, as adopted in Canada, the subrogation of the insurers is more extensive than has been already stated; and, though liable for and paying only a part of the damage done, they may be subrogated *pro tanto* to the remedy of the insured against the wrong-doer who has caused the loss, and may thereupon maintain a suit in their own names for the recovery of their payment from such wrong-doer.[4]

§ 233. **Subrogation of Mortgagee to Insurance procured by Mortgagor.** — A mortgagee as such has no claim to the benefit of a policy of insurance procured upon the mortgaged property by and for the mortgagor;[5] and the same is the case with the holder of a mechanic's lien.[6] But an agreement, express or implied, on the part of the mortgagor, that he will keep the mortgaged premises insured for the protection of the mortgagee, will create an equitable lien upon the money due for a loss,[7] though the policy was procured by the mortgagor

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[1] Dillon *v.* Hunt, 105 Mo. 154.

[2] Commercial Ass. Co. *v.* Lister, L. R. 9 Ch. 483.

[3] Insurance Co. of North America *v.* Fidelity Title Co., 123 Penn. St. 523.

[4] Quebec Ass. Co. *v.* St. Louis, 7 Moore, P. C. 286, *Parke, B.*, citing Alauzel on Assurance, p. 384, § 477; Pardessus, *Cours de Droit Commerciel*, 595; Quinault, p. 248; Toullier, tit. IV. § 175; Emerigon (English trans., 1850), Ch. XII. § 14, pp. 329–336; Pothier on Assurance, p. 248.

[5] Columbia Ins. Co. *v.* Lawrence, 10 Peters, 507; Nichols *v.* Baxter, 5 R. I. 491; Franklin Savings Institution *v.* Central Ins. Co., 119 Mass. 240; Wilson *v.* Hill, 3 Met. (Mass.) 66; McDonald *v.* Black, 20 Ohio, 185; Nordyke & Marmon Co. *v.* Gery, 112 Ind. 535; Ryan *v.* Adamson, 57 Iowa, 30; Carter *v.* Rockett, 8 Paige (N. Y.), 437.

[6] Rackley *v.* Scott, 61 N. H. 140.

[7] Reid *v.* McCrum, 91 N. Y. 412.

although he has, by his sale, made rebuilding by the mortgagor or his representatives impossible.[1] But the mortgagee cannot hold the insurers liable for the amount of a loss under such a policy which they have paid to the mortgagor before they had notice of the terms of the mortgage.[2]

§ 234. **Where a Creditor obtains Insurance upon Property on which he has a Lien.** — Where a creditor effects insurance upon property mortgaged or pledged to him to secure the payment of his demand, the insurers do not become sureties for the debt, nor do they acquire all the rights of such sureties.[3] They are insurers of the particular property only; and so long as the property remains liable for the debt, so long its destruction by fire will be a loss to the creditor within the terms of the policy.[4] Accordingly, it has been held in Massachusetts that a mortgagee who has, at his own expense, insured his interest in the mortgaged property against loss by fire may, in case of such a loss before he has received payment of his demand, collect the amount of the loss from the insurers for his own use, without first assigning the mortgage or any interest therein to the insurers;[5] nor can the insurers, upon offering to pay the loss and the additional amount due upon the mortgage above the loss, require the mortgage to be assigned to them, and thus be subrogated to the rights and remedies of the insured under his mortgage.[6] But this Massachusetts rule has not been generally followed elsewhere.[1] And in New Jersey the insurers will, in such a case, upon their payment of the loss, be subrogated *pro tanto* to the benefit of the mortgage or other security held by the insured, and by paying to the insured the whole amount of the claim for which the latter holds his securities, they will become entitled to all such securities;[2] and if after effecting the insurance the insured has parted with any of his securities or received partial payment of the debt for which they are held, and which gives him his insurable interest, the liability of the insurers will be proportionally diminished,[3] unless the insurance was really intended for the benefit of the debtor.[4]

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[1] Thomas v. Vonkapff, 6 Gill & J. (Md.) 372.

[2] Stearns v. Quincy Ins. Co., 124 Mass. 61.

[3] Cone v. Niagara Ins. Co., 60 N. Y. 619; Excelsior Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 359; Hadley v. N. H. Ins. Co., 55 N. H. 110. But see Kip v. Mutual Ins. Co., 4 Edw. Ch. (N. Y.) 86.

[4] *Bradley, J.*, in Insurance Co. v. Stinson, 103 U. S. 25; International Trust Co. v. Boardman, 149 Mass. 158; Cassa Marittima v. Phœnix Ins. Co., 129 N. Y. 490.

[5] King v. State Ins. Co., 7 Cush. (Mass.) 1, citing and considering Columbia Ins. Co. v. Lawrence, 10 Peters, 507; Roberts v. Traders' Ins. Co., 17 Wend. (N. Y.) 631; Ætna Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385; Carpenter v. Providence Ins. Co, 16 Peters, 495.

[6] Suffolk Ins. Co. v. Boyden, 9 Allen (Mass.), 123; Provincial Ins. Co. v. Reesor, 21 Grant Ch. (Up. Can.) 296; 33 Up. Can. Q. B. 357.

§ 235. **Rights of Mortgagor in Insurance obtained by Mortgagee.** — A mortgagor is not entitled to the benefit of insurance in the mortgaged property obtained by the mortgagee in his own name, at his own expense, and without the privity of the mortgagor, and in the event of a loss cannot require the amount received by the mortgagee upon such insurance to be applied in reduction of the mortgage-debt.[5] The interests of the mortgagee and of the mortgagor, though both insurable, are separate and distinct from each other.[6] But if the mortgagee has procured the insurance, though in his own name, at the request and expense and for the benefit of the mortgagor, as well as for his own protection,[1] though this is by a parol agreement unknown to the insurers, the mortgagor will have the right, in case of a loss, to have the avails of the policy applied for his relief towards the discharge of his indebtedness.[2] So, if the owner of land, after executing an agreement for its sale, but before making a conveyance, insures the buildings standing upon the land, and not merely the purchase-money agreed to be paid to him, he may upon a loss recover the whole amount of the insurance, and will hold any surplus over the balance of the purchase-money due to him in trust for the vendee of the premises;[3] and the insurance company will have no right of subrogation to his claim upon the vendee for such purchase-money.[4] Where the owners of real estate holding insurance against the loss of the buildings by fire, assigned the policy to a mortgagee of the estate, and a loss having occurred, the assignee brought suit upon the policy in the name of the insured, and obtained judgment thereon, and then, instead of collecting this judgment, coerced the payment from the insured by a foreclosure of his mortgage, the insured was held to be entitled to the benefit of this judgment although, while the assignee held the policy, he had effected other insurance upon the property, without notice to the insurers.[5]

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[1] Castellain *v.* Preston, 11 Q. B. D. 380, reversing s. c., 8 Q. B. D. 613, which followed the Massachusetts cases cited *supra;* Thomas *v.* Montauk Ins. Co., 43 Hun (N. Y.), 218; Pendleton *v.* Elliott, 67 Mich. 496; Baker *v.* Fireman's Ins. Co., 79 Calif. 34.

[2] Boundbrook Ins. Co. *v.* Nelson, 41 N. J. Eq. 485.

[3] Sussex Ins. Co. *v.* Woodruff, 26 N. J. Law (2 Dutch.), 541, criticised in Ins. Co. *v.* Stinson, 103 U. S. 25.

[4] Nelson *v.* Boundbrook Ins. Co., 43 N. J. Eq. 256, reversing for that reason s. c., 41 N. J. Eq. 485.

[5] Russell *v.* Southard, 12 Howard, 139; Honore *v.* Lamar Ins. Co., 51 Ills. 409; Stinchfield *v.* Milliken, 71 Maine, 567; Concord Ins. Co. *v.* Woodbury, 45 Maine, 447; Burlingame *v.* Goodspeed, 153 Mass. 24; White *v.* Brown, 2 Cush. (Mass.) 412; Cushing *v.* Thompson, 34 Maine, 496.

[6] Johnson *v.* North British Ins. Co., 1 Holmes, C. C. 117; Tuck *v.* Hartford Ins. Co., 56 N. H. 326; Wheeler *v.* Watertown Ins. Co., 131 Mass. 1; Carpenter *v.* Continental Ins. Co., 61 Mich. 635; Westchester Ins. Co. *v.* Foster, 90 Ills. 121; Niagara Ins. Co. *v.* Scammon, 28 No. E. Rep. 919.

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[1] Waring *v.* Loder, 53 N. Y. 581; Clinton *v.* Hope Ins. Co., 45 N. Y. 454, 467; De Wolf *v.* Capital City Ins. Co., 16 Hun (N. Y.), 116.

[2] Holbrook *v.* Am. Ins. Co., 1 Curtis, C. C. 193; Phœnix Ins. Co. *v.* Chadbourne, 31 Fed. Rep. 300; Hay *v.* Star Ins. Co., 77 N. Y. 235; Kernochan *v.* N. Y. Ins. Co., 17 N.Y. 428 (affirming s. c. 5 Duer (N. Y.), 1); Phœnix Ins. Co. *v.* Parsons, 56 N. Y. Super. Ct. 423; Grosvenor *v.* Atlantic Ins. Co., 17 N. Y. 391; Norwich Ins. Co. *v.* Boomer, 52 Ills. 442; Concord Ins. Co. *v.* Woodbury, 45 Maine, 447; Honore *v.* Lamar Ins. Co., 51 Ills. 409; Ætna Ins. Co. *v.* Baker, 71 Ind. 102; Klein *v.* Union Ins. Co., 3 Ontario, 234; Richardson *v.* Home Ins. Co., 21 Upper Canada (C. P.), 291; Hazard *v.* Canada Ins. Co., 39 Upper Canada (Q. B.), 419. See Morrison *v.* Tenn. Ins. Co., 18 Mo. 262.

[3] Reed *v.* Lukens, 44 Penn. St. 200.

[4] Ins. Co. *v.* Updegraff, 21 Penn. St. 513.

[5] Roberts *v.* Traders' Ins. Co., 17 Wend. (N. Y.) 631.

as the mortgagee is unsatisfied, he has the right to keep the control of such an action, and to receive the avails thereof.[1]

§ 237. **Where the Policy stipulates for the Subrogation of the Insurers.** — A policy of insurance taken out by the mortgagor or the owner of the equity of redemption, and made payable in case of loss to the mortgagee, which, besides a stipulation that a forfeiture as to the mortgagor shall not affect the right of the mortgagee to recover for a loss, contains also the provision that, in case of the payment to the mortgagee of a loss for which the insurers would not be liable to the mortgagor, the insurers shall be subrogated to the rights of the mortgagee and entitled to an assignment of the mortgage, is not available to the mortgagor, after a forfeiture of his right under the policy;[2] and, upon the payment of such a loss by the insurers to the mortgagee, they may take an assignment of the mortgage, and collect from the mortgagor the whole amount of the debt secured thereby.[3] If the mortgagee has destroyed the insurers' right of subrogation to the mortgage, he can no longer hold the insurers liable upon the policy.[4] The same rule will be applied to a policy of insurance procured by a mortgagor and made payable in case of loss to a mortgagee, which has become forfeited by its terms, but which has been kept alive as to the mortgagee by an agree-

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Co., 5 Gray (Mass.), 52; Turner *v.* Quincy Ins. Co., 109 Mass. 568. But see Friemansdorf *v.* Watertown Ins. Co., 9 Biss. C. C. 167; Chrisman *v.* State Ins. Co., 16 Oreg. 283.

[1] Ripley *v.* Astor Ins. Co., 17 How. Pr. (N. Y.) 444; Cone *v.* Niagara Ins. Co. 60 N. Y. 619; Frink *v.* Hampden Ins. Co., 45 Barb. N. Y. 384; Hammel *v.* Queen Ins. Co., 50 Wisc. 240; Hartford Ins. Co. *v.* Olcott, 97 Ills. 439; Hadley *v.* N. H. Ins. Co., 55 N. H. 110; Chamberlain *v.* N. H. Ins. Co., 55 N. H. 249; Motley *v.* Manufacturers' Ins. Co, 29 Maine, 337; Brown *v.* Roger Williams Ins. Co., 5 R. I. 394; National Ins. Co. *v.* Crane, 16 Md. 260; Richelieu Nav. Co. *v.* Thames Ins. Co., 58 Mich. 132; Price *v.* Phœnix Ins. Co., 17 Minn. 497; *Fletcher, J.*, in Barrett *v.* Union Ins. Co., 7 Cush. (Mass.) 175, 181; cited approvingly in Phillips *v.* Merrimack Ins. Co., 10 Cush. (Mass.) 353.

[2] Phœnix Ins. Co. *v.* Floyd, 19 Hun (N. Y.), 287.

[3] Allen *v.* Watertown Ins. Co., 132 Mass. 480; Ulster Ins. Co. *v.* Leake, 73 N. Y. 161; Springfield Ins. Co. *v.* Allen, 43 N. Y. 389.

[4] Lett *v.* Guardian Ins. Co., 52 Hun, 570.

ment between him and the insurers that his interest shall be absolutely insured, and that the insurers may be subrogated to his rights upon their payment to him of a loss, if the policy become avoided as to the mortgagor.[1] This stipulation for the benefit of the mortgagee, though contained in a policy issued to the mortgagor, is an independent agreement between the insurers and the mortgagee, which is binding upon them,[2] but with which the mortgagor has no concern.[3] And if the mortgagee has himself insured his interest as such by a policy providing that upon the payment to him of a loss he shall assign his mortgage to the insurers, they will, upon paying to him the amount of a loss and taking an assignment of his mortgage, be entitled to all his original rights under the mortgage for the whole of the debt secured thereby.[4] But the mortgagee's debt must be paid in full before the insurers can compel him to make over to them any share or proportion in the mortgage or the mortgage-debt.[5]

§ 238. **Between Lessor and Lessee or Vendor and Purchaser.** — If the lessee of buildings has by the terms of his lease the option to purchase them, and they are insured for the benefit of the lessor, the lessee cannot, after the buildings have been burned, and the lessor has received the amount of his insurance, require, by then exercising his option to purchase, the insurance-money to be applied towards the satisfaction of his purchase-money and the arrears of his rent.[6] But if the insurance was procured by the lessee in accordance with his agreement, and for his benefit after exercising his option to purchase, he will, upon the exercise of this option after the occurrence of a loss, be entitled to the benefit of such insurance.[1] In one case, it appeared that a lessee had by the terms of his lease the option of purchasing the leased premises for a stipulated price by giving certain notice of his intention to do so. The lessor covenanted to insure, and did insure. The buildings were burned down; and the lessor received the insurance-money. The lessee then gave seasonable notice of his intention to purchase, and claimed the benefit of the insurance-money as part payment of the stipulated price; but, the lease containing no provision as to the disposition of the insurance-money, it was held that the lessee was not entitled to it.[2] If in such a case the purchase is completed after the insurers have paid to the vendor the amount of the loss, and the vendor receives from the purchaser the full amount of the agreed price without any abatement for the loss of the buildings destroyed, the insurers may by subrogation claim from the insured vendor the full benefit of the salvage that he has thus received from the purchaser, and so recover back from him the amount of the loss which they have previously paid him.[3] The tenant has no interest in insurance procured for the benefit of the landlord,[4] just as the landlord has no equitable claim upon the tenant's insurance of his own interest,[5] and just as vendor and vendee have respectively no equitable claim upon insurance procured by either upon his own interest,[6] unless by agreement be-

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[1] Ulster Savings Institution *v.* Leake, 73 N. Y 161. See Foster *v.* Equitable Ins. Co., 2 Gray (Mass.), 216.

[2] Dick *v.* Franklin Ins. Co., 81 Mo. 103, affirming s. c., 10 Mo. Ap. 376.

[3] Phœnix Ins. Co. *v.* Floyd, 83 N.Y. 613, affirming s. c., 19 Hun (N. Y.), 287. See Graham *v.* Firemen's Ins. Co., 8 Daly (N. Y.), 421.

[4] Foster *v.* Van Reed, 70 N. Y. 19; Thornton *v.* Enterprise Ins. Co., 71 Penn. St. 234; Dick *v.* Franklin Ins. Co., 10 Mo. Ap. 376; affirmed in 81 Mo. 103. See Traders Ins. Co. *v.* Race, 31 No. E. Rep. 392.

[5] Phœnix Ins. Co. *v.* First National Bank, 85 Va. 765.

[6] Gilbert *v.* Port, 28 Ohio St. 276. See Poole *v.* Adams, 12 W. R. 683.

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[1] Reynard *v.* Arnold, L. R. 10 Ch. 386.

[2] Edwards *v.* West, 7 Ch. Div. 858, criticising Lawes *v.* Bennett, 1 Cox, 167, and explaining Reynard *v.* Arnold, *supra*.

[3] Castellain *v.* Preston, 11 Q. B. D. 380, reversing s. c., 8 Q. B. D. 613, and distinguishing Burnand *v.* Rodocanachi, 7 App. Cas. 333, on the ground that the payment there made by the U. S. Government was not salvage, not demandable of right, but a mere gift, and so not the subject of subrogation.

[4] Darrell *v.* Tibbetts, 5 Q. B. Div. 560; Leeds *v.* Cheetham, 1 Sim. 146; Miltenberger *v.* Beacom, 9 Penn. St. 198; Tongue *v.* Nutwell, 31 Md. 302; Ely *v.* Ely, 80 Ills. 532.

[5] Merchants' Ins. Co. *v.* Mazange, 22 Ala. 168; Ely *v.* Ely, 80 Ills. 532.

[6] King *v.* Preston, 11 La. Ann. 95; Hammer *v.* Johnson, 44 Ills. 192; Wood *v.* Northwestern Ins. Co., 46

decisions might perhaps better be sustained by the apparent fact that no subrogation of the insurers could have been intended by the parties to this insurance than upon the reasons assigned by the court; for it has already been shown that the doctrine of subrogation is wholly independent of any privity or contractual relations between the parties to be affected by it.[1] And in almost all cases of the subrogation of marine or fire insurers to the remedies of the insured against a wrongdoer whose tort has caused the loss, this tort has affected the insurers "only by reason of their artificial contractual relations with the insured, to whom the wrong was done." But in these cases the subrogation of the insurers is contemplated, or must be presumed to have been contemplated, by the parties to the contract of insurance, since otherwise the insured would, contrary to the intent of the parties, receive more than an indemnity for the loss, or else the mere wrongdoer, the party primarily liable for the injury, would obtain the benefit of the insurers' subsidiary liability; a result which would be at variance with the principles of manifest justice from which the equitable doctrine of subrogation has been evolved. The payment by a life insurance company to a creditor of the amount of an insurance policy issued by it to him upon the life of his debtor, is not *pro tanto* a satisfaction of the debt,[2] unless the premiums have been paid by or for the debtor.[3] If the debtor pays off the indebtedness in his lifetime, he cannot require from the creditor an assignment of such a policy,[4] unless it was really obtained for him or at his expense.[5] One who, not being the owner of a policy

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Co., 79 N. Y. 72; Baltimore & Ohio R. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; Sherlock *v.* Alling, 44 Ind. 184.

[1] *Antea*, §§ 1, 11, 93.

[2] Humphrey *v.* Arabin, 2 Lloyd & Gould, Ir. Ch. Plunkett, 318.

[3] Bruce *v.* Garden, 22 L. T. (N. S.) 595, overruling S. C., 20 L. T. (N. S.) 1002; Morland *v.* Isaac, 20 Beav. 388; Coon *v.* Swan, 30 Vt. 6.

[4] Gotlieb *v.* Cranch, 4 De G., M. & G. 440; Knox *v.* Turner, L. R. 9 Eq 155.

[5] Courtenay *v.* Wright, 2 Giff. 337; Drysdale *v.* Piggott, 8 De G., M. & G. 546; Page *v.* Burnstine, 102 U. S. 664; Cammack *v.* Lewis, 15 Wallace,

of insurance, has paid the premiums thereon, will not by substitution to the rights of the owner be entitled to a lien thereon unless by reason of a contract with the owner, or by reason of the right of a trustee to indemnity out of the trust property for money expended by him in its preservation, or the right of a mortgagee to hold his lien for any money paid by him for the preservation of the property, or by the subrogation to the rights of such a mortgagee or trustee of one who has made such advances at their request and in their right.[1]

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643. See McKenty *v.* Universal Ins. Co., 3 Dillon, C. C. 448.

[1] Leslie *v.* French, 23 Ch. D. 552, commenting on Tharp, *in re*, 2 Sm. & Giff. 578, note; Swan *v.* Swan, 8 Price, 518; and Gill *v.* Downing, L. R. 17 Eq. 316.

CHAPTER VIII.

SUBROGATION OF STRANGERS.

SECTION
Strangers or Volunteers not entitled to Subrogation . . . 240
The Voluntary Payment of a Debt by a Stranger extinguishes it . 241
Application of this Principle to the Case of one who binds himself for a Pre-existing Debt . 242
And to one who loans Money to a Debtor for the Payment of the Debt 243
Application of this Principle to the Purchase of Coupons on Secured Bonds . . . . 243 *a*
Creditor not subrogated to Remedy of his Debtor against a Wrongdoer 244
SECTION
When the Person making Payment of the Debt of another regarded as a Stranger or Volunteer 245
Instances of the Subrogation of a Person on his paying the Debt of another 246
Subrogation of one paying a Debt at the Instance of the Debtor . 247
Conventional Subrogation . . 248
Conventional Subrogation upon Payment of a Debt, and a Remedy for the Payment itself, cannot coexist 249
Conventional Subrogation in Louisiana 250

§ 240. **Strangers or Volunteers not entitled to Subrogation.** — The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own.[1] One person cannot, by his unauthorized payment of the price of land which another has agreed to buy, substitute himself to the vendor's lien upon the land.[2] "The doctrine of subrogation," said Mr. Chancellor Johnson,[3] "is a pure unmixed equity, having its foundation in the princi-

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[1] Webster's Appeal, 86 Penn. St. 409; Hoover *v.* Epler, 52 Penn. St. 522; Clark *v.* Moore, 76 Va. 262; St. Francis Mill Co. *v.* Sugg, 83 Mo. 476; Sanford *v.* McLean, 3 Paige (N. Y.), 117; Griffin *v.* Orman, 9 Fla. 22; Shinn *v.* Budd, 14 N. J. Eq. 234.

[2] Truesdell *v.* Callaway, 6 Mo. 605.

[3] Gadsden *v.* Brown, Speers Eq. (So. Car.) 37, 41.

the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished by the payment.[1] It is well settled that no one can be allowed to obtrude himself upon another as his surety; and therefore if a man voluntarily pays the debt of another, without any agreement to that effect with the debtor, he cannot take the place of the creditor or recover the money so paid of the debtor, because the law does not permit one man thus officiously and without solicitation to intermeddle with the affairs of another.[2] One cannot, by voluntarily paying money or rendering service for another, not having been requested so to do, make that other his debtor,[3] or subrogate himself to the rights of the creditor.[4] A drayman, having contracted to haul and deliver to a vessel certain cotton, hauled it to the vessel and deposited it on the levee, at a place pointed out to him by the officers of the vessel, and left it there at their request, they declining to receipt for it on the ground that it was too late in the day. The cotton having been stolen in the night, the drayman paid its value to its owners, and brought his action against the vessel, to recover the amount of this payment. But it was held that he could not recover; for the cotton had been delivered to the vessel; the vessel was liable to the owners of the cotton; and the payment by the drayman, being one which he was not bound to make, did not subrogate him to the right of those owners.[5]

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[1] Shinn *v.* Budd, 14 N. J. Eq. 234; Conrad *v.* Buck, 21 W. Va. 396; Woods *v.* Gilson, 17 Ills. 218; Kitchell *v.* Mudgett, 37 Mich. 82; Simmons *v.* Walker, 18 Ala. 664; Morris *v.* Lake, 9 Sm. & M. (Miss.) 521; Moran *v.* Abbey, 63 Calif. 56; Terry *v.* O'Neal, 71 Tex. 592.

[2] United States *v.* Keehler, 9 Wallace, 83; Bancroft *v.* Abbott, 3 Allen (Mass.), 524; South Scituate *v.* Hanover, 9 Gray (Mass.), 420; *Bland, Ch.*, in Winder *v.* Diffenderffer, 2 Bland, Ch. (Md.) 199, citing Stokes *v.* Lewis, 1 T. R. 20; Norton *v.* Highleyman, 88 Mo. 621.

[3] Binford *v.* Adams, 104 Ind. 41; Fay *v.* Fay, 43 N. J. Eq. 438; Webb *v.* Cole, 20 N. H. 490.

[4] Homestead Co. *v.* Valley R. R. Co., 17 Wallace, 153; Langley *v.* Chapin, 134 Mass. 82; Hungerford *v.* Scott, 37 Wisc. 341; Traders' Ins. Co. *v.* Race, 31 No. E. Rep. 392.

[5] Roth *v.* Harkson, 18 La. Ann. 705.

§ 242. **Application of this Principle to the Case of one who binds himself for a Pre-existing Debt.** — The owner of an equity of redemption which was subject to several mortgages gave his notes with an indorser to the first mortgagee for the interest which was due on that debt. The indorser paid these notes at their maturity; but no assignment of the mortgage was made to him. On a subsequent sale of the property, he claimed to be subrogated to the rights of the first mortgagee to the amount which he had thus paid, and so to have a preference over the subsequent mortgagees in the surplus proceeds of the sale after the payment of the first mortgage. But it was held, that, as he was not a party to the original transaction, and there was nothing in the mortgage which provided for making him a surety, so as to subrogate him to the rights of the mortgagee, he was merely a volunteer, and accordingly was not entitled to the priority which he claimed. He could entitle himself to the benefit of the security held by the creditor only by an agreement to that effect, or by taking an assignment of a corresponding interest in the mortgage when he paid the note.[1] The same principle has been declared in South Carolina.[2]

§ 243. **Application of this Principle to the Case of one who loans Money to the Debtor for the Payment of his Debt.** — The mere loaning of money to a debtor to be applied by him in or towards payment of a debt which was a lien upon his estate does not of itself subrogate the lender in whole or in part to this lien,[3] even though it was understood between the parties to the transaction that it would have this effect,[4] unless there was such an agreement as to operate a conventional subrogation.[5] One who has advanced money to pay off liens upon a ship will not by reason of this bare fact be subrogated to the benefit of the liens,[1] unless at any rate it is clearly shown both that the money was so used and that it was advanced for that purpose on the credit of the vessel.[2] The lender of money which is applied by the borrower in part payment of the purchase-money of land is not thereby subrogated to the vendor's lien upon the land,[3] especially if this would prejudice the vendor's security for the amount unpaid,[4] unless the parties appear to have so intended,[5] or unless a fraud would otherwise be operated.[6] One who pays off a prior incumbrance upon property in which he has himself no interest to be protected will not by his payment be subrogated to the lien which he has discharged, as against those having intervening interests in the property,[7] even though, after the incumbrance had been really discharged by his payment of the debt, but not formally released, he took an assignment thereof, without the consent of the owner of the property.[8] Nor is the rule changed by the fact of his acquiring an interest immediately upon his payment.[9] If a guardian pays off an incumbrance upon his own land with his ward's money, it has been held that the ward is not thereby subrogated to the lien thus discharged.[10] But if, when he made his payment,

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[1] Swan *v.* Patterson, 7 Md. 164.

[2] Gadsden *v.* Brown, Speers Eq. 37.

[3] Nash *v.* Taylor, 83 Ind. 347; Price *v.* Courtney, 87 Mo. 387; Kline *v.* Ragland, 47 Ark. 111.

[4] Unger *v.* Leiter, 32 Ohio St. 210; Riffle's Appeal, 3 Brewst. (Penn.) 94; Bowen *v.* Barksdale, 33 So. Car. 142.

[5] Murphree *v.* Countiss, 58 Miss. 712; Baker *v.* Ward, 7 Bush (Ky.), 240.

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[1] The William A. Harris, 8 Benedicts, 210; The City of Salem, 31 Fed. Rep. 616.

[2] The Heinrich Bjorn, 8 Prob. D. 151; The St. Lawrence, 5 Prob. D. 250; The Anna, 1 Prob. D. 253; The Lime Rock, 49 Fed. Rep. 383; Nippert *v.* The J. B. Williams, 42 *Id.* 533, reversing s. c., 39 *Id.* 823; The Augustine Kobbe, 39 *Id.* 559, and 37 *Id.* 702; The Menominie, 36 *Id.* 197; The Wyoming, 36 *Id.* 493; The Tangier, 2 Lowell, 7.

[3] Griffin *v.* Proctor, 14 Bush (Ky.), 571; Durant *v.* Davis, 10 Heisk. (Tenn.) 522; Jones *v.* Lockard, 89 Ala. 575; Pettus *v.* McKinney, 74 Ala. 108; Nichols *v.* Dunn, 25 Ark. 129.

[4] Brower *v.* Witmeyer, 121 Ind. 83.

[5] See Carey *v.* Boyle, 53 Wisc. 574.

[6] Otis *v.* Gregory, 111 Ind. 505; Netterville *v.* Barber, 52 Miss. 168; *antea*, § 8.

[7] Downer *v.* Wilson, 33 Vt. 1; Wilson *v.* Soper, 44 Maine, 118; North River Construction Co., *in re*, 38 N. J. Eq. 433; Woods *v.* Gilson, 17 Ills. 218; Wolff *v.* Walter, 56 Mo. 292.

[8] Moody *v.* Moody, 68 Maine, 155.

[9] Gardenville Association *v.* Walker, 52 Md. 452.

[10] French *v.* Sheplor, 83 Ind. 266.

applied towards the payment of interest upon its first mortgage bonds or of operating expenses will not entitle the lender to any preference over the first mortgage bonds by way of subrogation.[1]

§ 244. **Creditor not substituted to Remedy of his Debtor against a Wrong-doer.** — One who has been injured by the act of a wrong-doer has no right, in consequence thereof, to be subrogated to the benefit of an indemnity which the wrong-doer may have taken against the consequences of his wrongful act;[2] nor, though his debtor may by reason of the wrong have become unable to pay him,[3] or he may have been put to expense about the person to whom the wrong has been done,[4] will he therefor be substituted to the remedy of such person against the wrong-doer.[5] A plaintiff cannot recover against a defendant for injury done by the latter to a third person, though this injury causes also a loss to the plaintiff, by reason of his contract relations with or for such third person.[6] A judgment-creditor can maintain no action against one who has converted to his own use the goods of the debtor, though the latter had no other property, and the creditor is thus prevented from obtaining the satisfaction of his demand,[7] unless this was done by fraudulent arrangement between the debtor and the wrong-doer,[8] or unless the creditor has before the conversion acquired a legal interest in the property by means of an attachment or levy thereon;[1] and then he sues in his own right, and not by substitution to the remedy of his debtor.[2] The same principle applies to an action by a carrier against his servant for damages done by the latter to goods in his possession, for which the carrier has satisfied the owner of the goods;[3] the action is maintained in the carrier's own right.

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[1] Morgan's Company *v.* Texas Central R. R. Co., 137 U. S. 172.

[2] McGay *v.* Keilback, 14 Abbott Pr. (N. Y.) 142.

[3] Green *v.* Kimble, 6 Blackf. (Ind.) 552.

[4] Anthony *v.* Slaid, 11 Metc. (Mass.) 290; Butler County *v.* McCann, 23 Ala. 599.

[5] Barker *v.* Mathews, 1 Denio (N. Y.), 335.

[6] Lumley *v.* Gye, 2 El. & Bl. 216; Smith *v.* Hurd, 12 Met. (Mass.) 371; Cunningham *v.* Brown, 18 Vt. 123; Conn. Ins. Co. *v.* N. Y. & N. H. R. R. Co., 25 Conn. 265; Braem *v.* Merchants Bank, 127 N. Y. 508; Ashley *v.* Dixon, 48 N. Y. 430; Dale *v.* Grant, 34 N. J. Law, 42; Jemmison *v.* Gray, 29 Iowa, 537.

[7] Green *v.* Kimble, 6 Blackf. (Ind.) 552; Wellington *v.* Small, 3 Cush. (Mass.) 145; Lamb *v.* Stone, 11 Pick. (Mass.) 527; Murtha *v.* Curley, 47 N. Y. Super. Ct. 393.

[8] Adams *v.* Paige, 7 Pick. (Mass.) 542. But see Klous *v.* Hennessy, 13 R. I. 332.

§ 245. **When the Person making Payment of the Debt of another regarded as a Stranger or Volunteer.** — It is sometimes difficult to ascertain when one who has paid a debt will be considered to have been a mere stranger or volunteer. A payment made in pursuance of a moral obligation,[4] or by one who was liable to be compelled to make it, will not be regarded as made by a stranger, and will not extinguish the indebtedness of the party on whom rests the ultimate liability.[5] So, where a guardian has been compelled to pay to his ward a sum of money due from a former guardian, on account of his having neglected to compel the payment thereof by the former guardian, he is by his payment subrogated to the right of the ward, and may recover the amount from the former guardian or the sureties upon the latter's bond.[6] Neither directors[7] nor stockholders are strangers to the corporation; they may be subrogated against both the corporation and other stockholders for payments of its debts made by them in a fair effort to protect their own interests in the corporate property.[8] If the corporate officers take no steps to redeem within the time allowed by law corporate property which has been sold on execution, a stockholder will, upon paying the judgment and redeeming the property, be subrogated to all the rights of the original purchaser at the sheriff's sale.[1] If trust-money is used by a trustee to pay off liens upon his own property, the *cestuis que trustent* cannot be called volunteers, and may be subrogated to the liens thus discharged.[2] An agent who pays money out of his own pocket to protect the estate of his principal that is in his charge is not a mere volunteer, and is entitled to all the equities that the same payment would have given to his principal.[3] The wife and children of one deceased who pay valid demands against his estate out of their individual means have been held not to be mere volunteers, and may be subrogated.[4] Said Thompson, C. J.,[5] "The principles of subrogation do not apply in favor of volunteers. They can obtain the right of substitution only by contract. The cases which I have referred to[6] illustrate who are not to be regarded as volunteers and strangers. One was the case of an indorser, who was substituted to the judgment-creditor whose judgment the proceeds of his note had paid. His indorsement was voluntary. Another paid for his own protection an execution on a prior judgment. He was not legally compelled to pay. A third and fourth advanced money, one in favor of an estate, and one to his ward. They were all subrogated, and not regarded as strangers. I regard the doctrine as ap-

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[1] Brown *v.* Casetes, 11 Cush. (Mass.) 348; Bates *v.* Blonsky, 62 How. Pr. (N. Y.) 429; Yates *v.* Joyce, 11 Johns. (N. Y.) 136.

[2] See Smith *v.* Blake, 1 Day (Conn.), 258; Platt *v.* Potts, 13 Ired. Law (Nor. Car.) 455; Matthews *v.* Pass, 19 Ga. 141.

[3] See Gray *v.* Boston Gas Co., 114 Mass. 149; Smith *v.* Foran, 43 Conn. 244.

[4] Slack *v.* Kirk, 67 Penn. St. 380.

[5] Heritage *v.* Paine, 2 Ch. Div. 594; The Jersey City, 43 Fed. Rep. 166; Rindge *v.* Coleraine, 11 Gray (Mass.), 158; Farmers' Bank *v.* Erie R. R. Co., 72 N. Y. 188; Gillett *v.* No. Am. Ins. Co., 39 Ills. App. 284; Jacques *v.* Fackney, 64 Ills. 87.

[6] Smith *v.* Alexander, 4 Sneed (Tenn.), 482.

[7] Harts *v.* Brown, 77 Ills. 226.

[8] Redington *v.* Cornwell, 90 Calif. 49.

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[1] Wright *v.* Oroville Mining Co., 40 Calif. 20; Bush *v.* Wadsworth, 60 Mich. 255. But see Eastman *v.* Crosby, 8 Allen, 206.

[2] Oury *v.* Sanders, 77 Tex. 278.

[3] Curry *v.* Curry, 87 Ky. 667.

[4] Burwell *v.* Snow, 107 Nor. Car. 82; Brown *v.* Frost, 95 Ind. 248; Carithers *v.* Stuart, 87 Ind. 424; Bayles *v.* Husted, 40 Hun (N. Y.), 376.

[5] Mosier's Appeal, 56 Penn. St. 76.

[6] Cheeseborough *v.* Millard, 1 Johns. Ch. (N. Y.) 409; Cottrell's Appeal, 23 Penn. St. 294; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Payne *v.* Hathaway, 3 Vt. 212; Wallace's Appeal, 5 Penn. St. 103; Kelchner *v.* Forney, 29 Penn. St. 47; Greiner's Estate, 2 Watts (Penn.), 414.

amount of a State tax for which its treasurer was in default, may be subrogated to the remedy of the State against the sureties upon the treasurer's official bond; for, while the ultimate liability was upon the treasurer, the payment was for the relief of the county, and so could not be deemed to have been voluntarily made.[1] So, where the general agent of an insurance company had appointed a local agent and taken from him a bond running to the company, conditioned that the local agent should pay over to the company all moneys received by him, and the general agent had paid to the company certain premiums received by the local agent but not accounted for by him, it was held, in a suit upon this bond brought in the name of the company for the benefit of the general agent, that since the latter had the appointment of the local agents, and was bound, not only by contract with the company, but in order to keep his own position, to pay over all moneys received by his subordinates, his settlement with the company for the local agent's defalcation did not discharge the bond, but he should be subrogated to the rights of the company against the sureties upon the bond.[2] A new corporation, having paid the debts of an old corporation whose place it was organized to take, may be subrogated to the rights of the old corporation, though its only title was under an invalid receiver's deed.[3] Where one, believing that he was a surety upon an administrator's bond, settled with the next of kin, who entertained the same belief, it was held, the discovery having been made that he was not such surety, and the administrator having become insolvent, that, having made the settlement and paid his money under a mistake of fact, he was not to be deemed an intermeddler, but must be regarded in equity as a purchaser for value of the claims of the next of kin against the administrator and the real sureties, and that he had an equity to be subrogated to the rights of the next of kin under the administration-bond.[1] And the general proposition has been laid down that one whose money has discharged claims against a trust estate, which it was bound to pay, though he cannot maintain an action at law against the trust estate or the *cestui que trust*, will be subrogated in equity to the rights of the holders of such claims;[2] but this must be limited to the case of one who has an interest in making the payment on which he rests his claim.[3]

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[1] Elder *v.* Commonwealth, 55 Penn. St. 485; Hughes *v.* Commonwealth, 48 Penn. St. 66.

[2] Hough *v.* Ætna Ins. Co., 57 Ills. 318.

[3] St. Louis Coal Co. *v.* Sandoval Coal Co., 116 Ills. 170.

§ 247. **Subrogation of one paying a Debt at the Instance of the Debtor.** — One who pays a debt at the instance of the debtor, under such circumstances that it appears to have been contemplated by the parties that he should become entitled to the benefit of the security for the debt held by the creditor from the debtor, may, as against the debtor and the debtor's estate,[4] be subrogated to the benefit of such security and of the debt which he has discharged.[5] And a party who has paid a debt at the request of the debtor, under circumstances which would operate a fraud upon him if the debtor were afterwards allowed to insist that the security for the debt was discharged by his payment, may also be subrogated to the security, as against that debtor.[6] But this subrogation will not be allowed against one interested in the property held as security, who was a stranger to the transaction by which the payment was made, and who was under no obligation for the payment of the debt,[1] unless it appears that the payment was made, not as an extinguishment of the debt, but in reliance upon, and as a purchase of, the security.[2] This is a species of conventional subrogation, being a subrogation by an implied convention or agreement.[3] Accordingly, it will not be allowed if it appears not to have been intended by the parties,[4] though this intention, if not expressed, may ordinarily be determined from the circumstances attending the transaction.[5] Nor can one be subrogated to an equitable lien merely because he has advanced to the real creditor the money with which the loan was made.[6]

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[1] Capehart *v.* Mhoon, 5 Jones, Eq. (Nor. Car.) 178. *Contra*, Dawson *v.* Lee, 83 Ky. 49.

[2] Hines *v.* Potts, 56 Miss. 346.

[3] *Antea*, §§ 12, 245. See Parks *v.* Watson, 20 Fed. Rep. 764.

[4] Pearl *v.* Hervey, 70 Mo. 160.

[5] Stebbins *v.* Willard, 53 Vt. 665; Zell's Appeal, 111 Penn. St. 532; Denton *v.* Cole, 30 N. J. Eq. 244; Wilson *v.* Brown, 13 N. J. Eq. 277; Caudle *v.* Murphy, 89 Ills. 352; Lily *v.* Dunn, 96 Ind. 220; Rodman *v.* Sanders, 44 Ark. 504; Roy *v.* Clarke, 75 Tex. 28; Wahrmund *v.* Merritt, 60 Tex. 24, 27; Dillon *v.* Kauffman, 58 Tex. 696.

[6] Stevens *v.* King, 84 Maine, 291; Lockwood *v.* Marsh, 3 Nevada, 138; Oury *v.* Sanders, 77 Tex. 278.

§ 248. **Conventional Subrogation.** — It has been said that whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution.[7] But the doctrine generally adopted, and that of these very cases when limited to the point actually decided, is that a conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor or the debtor,[8] and that it is not sufficient that a person paying the debt of another should have merely the understanding on his part that he is to be subrogated to the rights of the creditor,[9] though, if the agreement has been made, a formal assignment will not be necessary.[10] And the agreement may be shown by subsequent acts which indicate a prior agreement. Thus,

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[1] Wolff *v.* Walter, 56 Mo. 292.

[2] Caudle *v.* Murphy, 89 Ills. 352.

[3] Brice's Appeal, 95 Penn. St. 145.

[4] White *v.* Cannon, 125 Ills. 412; White *v.* Curd, 86 Ky. 191; Bunn *v.* Lindsay, 95 Mo. 250; Ashton *v.* Clayton, 27 Kans. 626.

[5] Wilcox *v.* Logan, 91 Nor. Car. 449.

[6] Van Winkle *v.* Williams, 38 N. J. Eq. 105.

[7] Tradesmen's Building Association *v.* Thompson, 32 N. J. Eq. 133; Coe *v.* New Jersey Midland R. R. Co., 27 N. J. Eq. 110; Owens *v.* Bedell, 19 Can. S. C. 137.

[8] Texas & St. Louis R. R. Co. *v.* McCaughey, 62 Tex. 621.

[9] New Jersey Midland R. R. Co. *v.* Wortendyke, 27 N. J. Eq. 658, reversing in part Coe *v.* New Jersey Midland R. R. Co., *supra*.

[10] Neely *v.* Jones, 16 W. Va. 625; Woods *v.* Ridley, 27 Miss. 120; Morrow *v.* U. S. Mortgage Co., 96 Ind. 21.

other.[1] He cannot, at the same time that he takes the benefit of the securities, claim also the advantages of having extinguished them by his payment. This principle was confirmed in a case in which it appeared that property was conveyed to trustees, to raise £75,000, with which to pay off prior mortgages, which, with arrears of interest, amounted to that sum. The trustees did not raise the money, but allowed a third party to pay off the mortgages and to take transfers of them, and then made a deed, purporting to assign to him the charge of £75,000, and to mortgage the property to him for that sum. But it was held that he could not charge interest on that sum, but that his right to stand as mortgagee was limited to the principal and interest due upon the mortgages that had been thus transferred to him.[2] On the same principle, it has been held that a creditor who has obtained possession of property of an insolvent debtor held in pledge by another creditor, by paying off the debt due to the latter, cannot afterwards maintain an action to recover the amount thus paid by him without offering to give up the pledged property.[3]

§ 250. **Conventional Subrogation in Louisiana.**— In Louisiana conventional subrogation to the rights and securities of a creditor in favor of a third person paying the debt can take place only by an express and formal agreement to that effect entered into by the creditor[4] at the time of the payment.[5] Accordingly, in that State, one who advances money to a debtor for the purpose of paying an indebtedness secured by a mortgage, under an agreement with the debtor that he shall, for his security, be subrogated to the benefit of the mortgage, will nevertheless have no such right of subrogation, unless the creditor was also a party to the agreement in the prescribed form.[1] Nor will facts showing the intention of the parties that the person making the payment should be subrogated to the benefit of the securities held by the creditor be sufficient to effect this substitution, unless this intention appears to have been actually executed by a conventional subrogation.[2] But since a conventional subrogation invests the person in whose favor it is made with all the rights and privileges of the creditor as fully as an assignment would do,[3] one who has paid a judgment to the plaintiff therein, and has been expressly subrogated to his rights, may take out an execution thereon to his own use; for such an express subrogation is a sufficient authority to use the creditor's name for the recovery of the debt from the judgment-debtor.[4]

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[1] *Antea*, §§ 41, 110.

[2] Thompson *v.* Hudson, L. R. 2 Ch. 255, affirming s. c., L. R. 2 Eq. 612.

[3] Byrne *v.* Hibernia Bank, 31 La. Ann. 81.

[4] Hoyle *v.* Cazabat, 25 La. Ann. 438; Sewell *v.* Howard, 15 La. Ann. 400.

[5] Brice *v.* Watkins, 30 La. Ann., Pt. I., 21; Levy *v.* Baer, 19 La. Ann. 468; Durac *v.* Ferrari, 26 La. Ann. 114; Surghnor *v.* Beauchamp, 24 La. Ann. 471.

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[1] Hoyle *v.* Cazabat, 25 La. Ann. 438; Virgin's Succession, 18 La. Ann. 42.

[2] Harrison *v.* Bislands, 5 Rob. (La.) 204; Chambliss *v.* Miller, 15 La. Ann. 713; Shaw *v.* Grant, 13 La. Ann. 52.

[3] *Antea*, § 5. Smith *v.* Wilson, 11 Rob. (La.) 522; Oakey *v.* Sheriff, 13 La. Ann. 273.

[4] King *v.* Dwight, 3 Rob. (La.) 2; Nugent *v.* Potter, 21 La. Ann. 746.

ACTION — *continued.*
- subrogation of surety in, against prior sureties, 131 *et seq.*
  - *See* SUCCESSIVE SURETIES.
- whether maintained by surety on original obligations, 135 *et seq.*
- surety's right to original judgment against principal, 135–138.
- commenced against principal, surety's right to continue, 137.
- on promise of new firm to pay debts of old, 171 *a.*
- against maker of note, after indorser's payment, 181.
- against bank for negligence, indorser subrogated to, 181.
- indorsee of note, how far subrogated to, 183.
- not for bare tort, 183.
- by insurers, in whose name, 221, 229 *et seq.*
- for failure to insure, subrogation to, 229.
- insurers not subrogated to, against insured, 223.
- by insurers against carrier of insured goods, 229.
  - against party at fault for loss by fire, 230 *et seq.*
- upon policy taken by mortgagor for benefit of mortgagee, 236.
- by life insurers against party causing the death, 239.
- by person injured to reach indemnity of wrong-doer, 244.
- payment unauthorized no ground for, 240 *et seq.*
- by person suffering from injury done to another, 244.
- by carrier against servant for injury to goods, 244.
- by judgment-creditor against one who has converted goods of debtor, 244.
- for a payment, cannot co-exist with conventional subrogation, 249.

ADMINISTRATION OF ESTATES,
- subrogation to lien of legacy upon devised lands, 21.
- devisee of contingent remainder subrogated, 36 *a.*
- debt extinguished by payment by heir under bond to pay it, 50, 215.
- rights of purchaser of parts of land charged with legacies, 77, 216.
- subrogation of sureties of administrator, 89.
  - subrogated to property held by administrator, 100.
- rights of surety upon note given by personal representative, 100.
- executors subrogated to lien upon a legacy, 100.
- representative cannot bind estate by new contract, 100.
- sureties of one executor not subrogated against the other, 113.
- legacies purchased at discount reckoned only at cost, 151.
- subrogation of personal representative to debts which he has paid, 202.
  - only for actual value of payments, 202.
  - surety of representative subrogated in same way, 202.
  - not allowed upon payment made for his own relief, 202.
  - right paramount to that of distributees, 202.
  - subrogation to rights of legatee, 202.
  - one executor subrogated to charge waived by the other, 202.
  - executors not liable for each other's waste, 202.
  - this subrogation must be seasonably claimed, 203.
  - not allowed to prejudice of creditors, 202, 203.
  - has no priority over other debts of estate, 203.

ADMINISTRATION OF ESTATES — *continued.*
    subrogation to rights of overpaid creditors, 203.
    trustee subrogated for payments made to protect trust estate, 203.
  subrogation of creditors of deceased, 204.
    to newly discovered assets, 204.
    marshalling of assets among them, 204.
    creditor subrogated to rights of vendor, 204.
    but not of heirs, 204.
  creditors may hold property purchased with funds of estate, 205.
    subrogated to executor's right of reimbursement, 206.
    though having no remedy directly against estate, 206.
    recovery of trade debts, 206.
    on contracts made by the executors, 206.
  where creditor may hold both real and personal estate, 207.
    when required first to exhaust one fund, 207.
  subrogation of tenant for life against remainderman, 207 *a*.
  where redemption made by tenant for life, 207 *a*.
  subrogation in favor of legatees, 208 *et seq.*
    marshalling of assets for their benefit, 208.
    legatees subrogated to the rights of creditors, 208.
    and of vendors, 208.
    where debt primarily chargeable upon devised land, 208.
    legatees subrogated against liens, 208.
    not as against devisees, 208.
  subrogation of purchaser from personal representative, 209.
    not allowed to personal representative if himself purchaser, 209.
  where legatees have paid judgments against the estate, 210.
    subrogated to charge which they are compelled to pay, 210.
    widow subrogated for dower to rights of creditors, 210.
  subrogation of specific devisees and legatees, 211.
    to debts which executor ought to have paid, 211.
    their lien-creditors have same right, 211.
    where specific legacies sold for payment of debts, 211.
    of devisees to subsequently acquired assets, 212.
    creditors how subrogated to this right, 212.
  rights of heirs, devisees, or legatees against each other, 213.
    subrogated against primary debtor, 213.
    contribution to make up loss of one, 213.
  specific bequest charged with expense of its protection, 214.
    executor subrogated to lien of such charge, 214.
  co-legatees subrogated against each other, 214.
  subrogation against heirs to burden discharged by one, 215.
  heir subrogated if exempt property taken for debts of ancestor, 215.
    not to be refused subrogation as stranger, 245.
  rights of purchaser from heir or devisee, 216.
    subrogated against his grantor, 216.
    his land liable in inverse order of conveyances, 216.
  creditors subrogated to rights of legatees, 217.

ADMINISTRATION OF ESTATES — *continued.*
        when their fund has paid the legacies, 217.
        and to prior liens discharged out of funds available to them, 217.
    election as a ground of subrogation, 218 *et seq.*
    disappointed devisee subrogated to what declined by election, 218 *et seq.*
        See ELECTION.
    subrogation to devise upon condition, 220.
    condition to support complied with by another, 220.
ADMINISTRATOR. *See* ADMINISTRATION OF ESTATES.
ADMIRALTY,
    subrogation of one advancing money to pay lien in, 243.
ADVERSE CLAIM,
    purchaser under, not subrogated, 31.
AGENCY,
    agent not subrogated to right of principal whom he has satisfied, 5.
        unless liable as guarantor or surety, 5.
    carrier's agent subrogated to rights of carrier, 10.
    agent when subrogated, 10 *a.*
    agent of real debtor not subrogated, 46.
    notice of rights of junior to agent of prior creditor, 72.
    creditor bound by notice to his attorney, 81.
    agent not refused subrogation as volunteer, 245.
    general agent subrogated on paying debt of subordinate, 246.
AGREEMENT. *See* CONTRACT; CONVENTIONAL SUBROGATION.
ALABAMA,
    original obligation preserved after surety's payment, 137.
    assignment to surety, effect of, in, 137.
APPEAL,
    from judgment against principal, allowed to surety, 101.
    rights of sureties on, against creditor, 117.
    their rights against each other, 131.
        See SUCCESSIVE SURETIES.
APPLICATION,
    of value of property primarily liable, 79.
    of security, creditor's right to make, against surety, 117, 129.
    of deposits, to payment of bank, 124.
    of security held for several debts with surety, 129.
    of security held by surety to payment of debt, 154 *et seq.*
        See SUBSTITUTION.
    of security of different owners held for same debt, 172 *et seq.*
        See JOINT DEBTORS.
    of security given for notes and bills, 187 *et seq.*
        See NOTES AND BILLS.
APPORTIONMENT,
    among co-sureties. *See* CO-SURETIES.
    of freight after abandonment of ship, 225 *et seq.*

ASSIGNMENT — *continued.*
abandonment to insurers equivalent to, 221 *et seq.*
may be evidence of conventional subrogation, 248.

ASSUMPTION,
of mortgage by purchaser of premises, 22 *et seq.*
See PURCHASER.
of mortgage prevents subrogation against it, 46.
exception in Pennsylvania, 35.
by purchaser of part of premises, 82.
remedy of mortgagee against one assuming mortgage, 85.
of debt by a surety, effect of, 112.

ATTACHMENT,
rights of successive attaching creditors in mortgaged premises, 22.
dissolved by bankruptcy, subrogation to, 23.
subrogation of one purchasing property under, 38.
upon property conveyed in fraud of creditors, rights ot grantee, 40.
subrogation of first purchaser subject to, 84.
how far surety discharged by creditor's release of, 122.
against principal, preserved after surety's payment, 137.

ATTORNEY,
subrogated to rights of client, 10 *a.*
subrogation upon payment to attorney, 15.
creditor bound by notice to his, 81.

AVOIDANCE OF SALE. *See* PURCHASER.

B.

BAIL,
sheriff's neglect to assign bond of, ground of subrogation, 7.
of one defendant has no right against another, 113.
of shipmaster not subrogated against owners, 113.
subrogation of, against prior sureties, 131 *et seq.*
See SUCCESSIVE SURETIES.
can recover contribution only for actual payment, 151.
of one partner not subrogated against the firm, 171.
in criminal cases, not subrogated, 168.

BANK,
carrier subrogated against, upon paying for destroyed bills, 10.
subrogation of depositor against, 10 *a.*
right to apply deposits of its debtor against surety, 123.
how far surety discharged by neglect of, to apply deposits, 124.
not compelled to apply surety's deposits, 124.
securities held by, against acceptances, available to holders of bills, 190.
rights of, to deposits, against equities of third parties, 192, 197.
subrogation upon payment of check, 4.
subrogation of holder of check, 200 *a.*
indorser subrogated against, for its negligence, 181.

BANKRUPTCY AND INSOLVENCY,
  assignee redeeming pledges subrogated to rights of pledgee, 23.
    subrogated to security waived by proof of claim, 23.
    to lien of dissolved attachments, 23.
    and to action against primary debtor, 23.
  assignee's avoidance of prior lien will not advance junior, 23.
  purchasers subrogated to lien of taxes in, 35.
  assignment of incumbrance to debtor's assignee in, not a merger, 49.
  subrogation of surety before payment, in case of, 97.
  entitles surety to benefit of principal's set-off, 101.
  of principal, rights of surety upon, 102.
  rights of wife as surety against husband's estate in, 104.
  creditor's waiver of security by proof in, how far discharges surety, 120, 122.
  effect of surrender of lease in, 126.
  surety may have debt proved against estate of principal in, 130.
  surety's indemnity available to creditor upon, 160–162.
  proof in, against maker of note after payment by indorser, 182.
  indorser subrogated to proof by maker, 182.
  security of indorser available to holder on, 187.
  securities held by acceptor in, available to holders of bills, 190.
    See NOTES AND BILLS.
  acceptor's indemnity available to holder of bill only upon, 198.
  acceptor subrogated to securities of holder upon, 198.
  rights of mortgagee to mortgagor's insurance in, 233.

BILL OF LADING,
  rights of holder of bill drawn against, 189 *et seq.*

BILL IN EQUITY. *See* EQUITY.

BILLS. *See* BANK.

BILLS AND NOTES. *See* NOTES AND BILLS.

BONA FIDE HOLDER,
  of note, transferee of, substituted to rights of, 183.
  of securities for payment of note, 192.

BOND. *See* INCUMBRANCE; RAILWAY SECURITIES; SUCCESSIVE CLAIMS.
  issued *ultra vires*, subrogation for, 19.
  for title, rights of grantee of one who holds, 34.
  subrogation of surety on, 86 *et seq.*
  on appeal, rights of sureties against creditor, 117.
    against each other, 131 *et seq.*
  secured by mortgage to government, subrogation of holders of, 167 *a.*
  surety on, how discharged by act of creditor, 119 *et seq.*, 126 *a.*
  bondholders not subrogated to appropriation to railroad, 167 *a.*
  purchase of coupons, 243 *a.*
  loan of money to pay coupons, 243 *a.*

C.

CALIFORNIA,
  surety subrogated to original obligation in, 137.
  but not mere joint debtor, 137.
  rights of purchaser at foreclosure in, 32.

CANADA,
  subrogation of insurers in, *pro tanto*, 232.

CAPTURE,
  insurers subrogated to remedy of insured for, 222 *et seq.*

CARRIER,
  subrogated to rights of owners of goods whom he has satisfied, 10.
  and to lien of antecedent carrier, 10.
  agent of, subrogated like, 10.
  charges of, pledgee subrogated to, 12.
  sheriff subrogated to charges of, which he has paid, 12.
  how far bound by fraudulent bill of lading, 189 *a*.
  of insured goods, insurers subrogated against, 229.
  not subrogated upon payment for which he was not liable, 241.
  action against servant for injury to goods, 244.

CESSION. *See* Assignment.
  of creditor's remedies by subrogation, 11.

CHECK,
  subrogation upon payment of, 4.
  application of deposits to pay checks, when release of surety, 123.
  subrogation of holder of, to rights of drawer, 200 *a*.

CHILD. *See* Parent.
  subrogation against, for necessaries, 243.

CIRCUITY OF ACTION,
  creditor thrown upon primary fund to avoid, 208.

CITY. *See* Government.

CIVIL LAW,
  definition of subrogation in the, 2.
  allows subrogation for whose benefit, 2.
  subrogation of insurers by, 232.

CLERK OF COURT,
  subrogation of sureties of, 89.
  laches of, in official act, no defence to surety, 121.

COLLATERAL SECURITY. *See* Securities.

COLLECTOR,
  not subrogated to claim of government, growing out of his own wrong, 4.
  may be subrogated to lien of taxes after payment, 7.

COLLISION,
  insurers subrogated to remedy of insured for, 222, 223.

CONVENTIONAL SUBROGATION—*continued.*
  results from direct agreement, 248.
  subsequent agreement may be evidence of, 248.
  payment in full essential to, 248.
  cannot co-exist with action for payment itself, 249.
  rules governing, in Louisiana, 250.

CO-OBLIGOR. *See* JOINT DEBTORS; PRINCIPAL AND SURETY.

CORPORATION,
  subrogation against, for money borrowed *ultra vires*, 19.
  subrogation to lien of, upon stock of its shareholders, 61.
  limited subrogation to secondary liability of shareholders, 68.
  surety subrogated to lien of, against shareholders, 92.
  when surety discharged by, not enforcing such lien, 123.
  subrogation of director against, 245.
      of stockholder, 245.

CO-SURETIES,
  subrogated to priority of creditor against each other, 88.
  surety does not waive subrogation by exonerating his, 103.
  private arrangement among, will not affect rights against principal, 103.
  successive sureties for same debt are not, 131.
  subrogation of successive sureties against each other, 131 *et seq.*
      See SUCCESSIVE SURETIES.
  whether debt extinguished by one surety's payment, 137.
  subrogation to original judgment in Maryland, 137.
  subrogation against, upon one surety's payment, 140 *et seq.*
    allowed as means of obtaining contribution, 140.
    right passes to creditors and grantees of surety who has paid, 140.
    surety allowed use of creditor's remedies against, 140.
    when and how far in Massachusetts, 140.
  entitled to benefit of securities held by each other, 141.
    apportionment of indemnity against various liabilities, 141.
    right not lost by extinguishment of another security, 141.
    securities given by one surety to another, 141.
  cannot have contribution without accounting for securities, 142.
    even though sale made to himself, 142.
    this applies only to fund provided by principal, 142.
  surety holding security regarded as trustee for, 143.
    liable for his negligence or omission, 143.
  surety's rights and liabilities to, as to security, 144.
  surety may prevent discharge of security held by, 145.
  security held by one who is both creditor and surety, 146.
    he may appropriate it to his own claim, 146.
    but not to after-acquired claims, 146.
  must contribute to cost of security which they claim, 147.
    waiver by surety of right against co-sureties, 147.
  when surety may obtain separate indemnity for himself, 148.
    may stipulate for it on becoming surety, 148.

CO-SURETIES — *continued.*
        may obtain it from third party, 148,
        and after loss adjusted or liability fixed, 148.
    called upon for contribution, are entitled to subrogation, 149.
    preventing contribution, not to have subrogation, 149.
    subsequent sureties have not rights of, 150.
        successive accommodation parties to note, 150.
        mere difference of time or contract not enough, 150.
        who are, and who are not, 150.
        rights of, becoming also subsequent sureties, 150.
        of guarantor and surety, 150.
    extent of right of subrogation among, 151.
        only to obtain contribution for actual payment, 151.
        not entitled to security held for other debt, 151.
    discharged *pro tanto* by creditor's interference with right, 151.
    one surety holding security holds it for whole debt, 152.
        security to be used for protection of co-sureties, 152.
    subrogation of, subject to legal rights of third parties, 153.
        yields to rights accruing to others on apparent title, 153.
    successive parties to note, 188.

CO-TENANTS. *See* JOINT DEBTORS, PURCHASERS.
    rights of, on redeeming from tax-sale, 172.

COUNTY. *See* GOVERNMENT.

COUPONS. *See* BONDS.

CREDITOR,
    subrogation puts person in place of, 1.
    paying debt preferred to his, subrogated by civil law, 2, 3, 5.
    rights, remedies, and securities of, go to person subrogated, 2.
    meritorious, relieved by subrogation, 4.
    right of, not to be prejudiced by another's subrogation, 4.
    will not be subrogated against his own wrong, 4.
    remedies and securities of, pass to person subrogated, 11.
    right of, to pay prior creditors, 12 *et seq.*
        See SUCCESSIVE CLAIMS.
    right of principal to become surety without consent of, 25.
    purchaser under decree in favor of, subrogated, 31.
    subrogation of purchaser at execution sale, 38.
    not liable to refund price of property sold on execution, 39.
    conveyances in fraud of, rights of grantee, 40.
    real debtor not subrogated, 46.
    holding junior lien, subrogated to benefit of prior lien, 61 *et seq.*
        See MARSHALLING OF ASSETS.
    equitable substitution of, to security obtained by debtor, 85.
    surety paying, subrogated to rights of, 86 *et seq.*
    surety subrogated to agreement of, 95.
    of wife, subrogated to her rights against her husband's estate, 104.
    rights of, against surety or appeal bond, 117.
        See PRINCIPAL AND SURETY.

CREDITOR — *continued.*
substituted to security held by a surety, 154 *et seq.*
See SUBSTITUTION.
subrogation of joint debtors, 169 *et seq.*
creditor may hold all until fully paid, 169.
of deceased person, marshalling of assets for, 204.
may follow property purchased with funds of estate, 205.
substituted to rights of executors, 206.
See ADMINISTRATION OF ESTATES.
devisees subrogated to rights of, 212.
right to insurance between debtor and, 233 *et seq*
holding insurance on his debtor's life, 239.
not substituted to debtor's remedy against wrong-doer, 244.

CRIMINAL PROCEEDINGS,
subrogation not applied to bonds in, 168.

CUSTOMS. *See* TAXES.

D.

DEBT. *See* CREDITOR; PRINCIPAL AND SURETY; SUCCESSIVE CLAIMS.
held to subsist for one entitled to subrogation who has paid it, 13.
when, must be due and payable, to give ground for subrogation, 18.
how far extinguished by surety's payment, 135 *et seq.*
by joint debtor's payment, 180.

DEBTOR. *See* CREDITOR.

DECEASED PERSONS. *See* ADMINISTRATION OF ESTATES.

DECREE. *See* PRACTICE.

DEED. *See* RECORDS.
neglect to record, no bar to subrogation, 9, 30.
holder under invalid, subrogated, 36 *a*.
subrogation of a purchaser limited by terms of, 37.
given in fraud of creditors, subrogation under, 40.
quitclaim, of mortgage, operating as assignment, 40.
estoppel by, not enforced for one claiming against, 58.

DEFINITION,
of subrogation, 1.
in civil law, 2.

DELAWARE,
surety on bond entitled to assignment on payment, 137.
and to original judgment against principal, 137.

DEPOSITS. *See* BANK.

DEPUTY SHERIFF. *See* SHERIFF.

DEVISE,
subrogation of purchaser from devisee, 35.
devisee of contingent remainder subrogated, 36 *a*.

E.

ELECTION,
  mortgagee, when not compelled to make, 25.
  of one entitled to subrogation, 41.
  of creditor between different remedies, 41.
  of surety to take subrogation, 110.
    See MARSHALLING OF ASSETS, WAIVER.
  of surety between subrogation and indemnity, 110.
  subrogation of devisee or legatee disappointed by, 218.
    for compensation out of right waived by, 218.
    where widow waives provisions of will, 218.
  extent of this subrogation, 219.
    to the rights of party making the, 219.
  does not include bequest merely upon condition, 220.
  between subrogation and indemnity, 249.

ENDORSER. *See* NOTES AND BILLS.

ENGLAND,
  rights of junior incumbrancer in, 16.
  restriction of surety's subrogation in, 119.
  original obligation not extinguished by surety's payment, 135.
  mortgaged real estate of deceased first applied on debt, 211.
  rights of separate insurers on ship and freight, 227.

EQUITY,
  subrogation is a doctrine of, 1.
    but extended to common law, 1.
    to be carried out with equitable discretion, 4.
  will subrogate sheriff to judgment which he has been compelled to pay, 7.
  throws by subrogation debt upon party who ought to pay it, 11.
  treats purchaser who has assumed mortgage as principal debtor, 24, 25.
  reinstates incumbrance discharged in ignorance of intervening lien, 29.
  subrogates holder under invalid decree, 36 *a*.
  reinstating discharged mortgage, 20, 55.
  when, requires assignment to carry out subrogation, 45.
  rules of, as to merger, 53 *et seq.*
    See MERGER.
  marshalling of assets in, 61.
    See MARSHALLING OF ASSETS.
  rights in, of purchasers of parts of mortgaged estates, 74 *et seq.*
    See PURCHASERS.
  remedy of mortgagee in, against one assuming mortgage, 85.
  subrogation of sureties in, 86 *et seq.*
    See PRINCIPAL AND SURETY.
  lien of surety in, upon funds in hands of principal, 100.
  surety may come to, to compel principal to pay debt, 130.
  will give relief to surety, how, 130 *a*.

EQUITY — *continued.*
 will enforce rights of co-sureties to securities of each other, 140.
 enables creditor to reach security held by surety, 154 *et seq.*
  See SUBSTITUTION.
 gives compensation to devisee disappointed by election of another, 218 *et seq.*
 will enforce agreement for conventional subrogation, 248.

EQUITY OF REDEMPTION. *See* REDEMPTION.

ERROR. *See* WRIT OF ERROR.

ESTATES OF DECEASED PERSONS. *See* ADMINISTRATION OF ESTATES.

ESTOPPEL. *See* WAIVER.
 no subrogation against interests taken on faith of record, 17, 20.
 discharge of mortgage bars mortgagee, 20.
 formal discharge may not be, if no other rights intervene, 20.
 subrogation upon, of incumbrancer, 29.
 usury in taking new security no bar to subrogation, 42.
  in original transaction would be a bar, 42.
 how far negligence will be an, 43.
 subrogation will not relieve one against his own wrong, 44.
 one cannot be subrogated against his own warranty, 46.
 by release of dower, 49.
 of owner of equity to claim a merger, 56.
 by deed, not enforced for one claiming against the deed, 58.
 of mortgagee against purchaser of part of the estate, 78.
 surety subrogated to principal's rights by, 101.
 of surety, against a purchaser of security for the debt, 109.
 of carrier by fraudulent bill of lading, 189 *a*.
 of insurer no bar to subrogation, 223.

EVIDENCE,
 right of subrogation must be shown by, 11.
 parol, that conveyance subject to mortgage, 82.
 of intent as to security held for debt by surety, 156.
 right of joint debtor must be shown by, 179.
 of relation to each other of parties to note, 181.

EXECUTION,
 payment of, by officer, when a ground of subrogation, 7.
 interest taken by purchaser at sale under, 17.
 subrogation upon levy of, upon mortgaged lands, 21, 22.
 levy of, upon parts of an equity of redemption, 22.
 assignee in bankruptcy subrogated against levies under, 23.
 subrogation of purchaser of property sold on, 38.
  allowed against the debtor's claims, 38.
  where the property recovered by third parties, 39.
 release of debtor's land from levy, how far releases land of his grantee, 80.

EXECUTION — *continued.*
  release of levy on personal property, 80.
  surety's discharge by creditor's release of levy on principal, 122.
  levy upon surety's security extinguishes surety's lien, 163.

EXECUTOR. *See* ADMINISTRATION OF ESTATES.

EXONERATION,
  of secondary fund by release of primary fund, 78.
  of purchaser of part of incumbered estate by creditor's purchasing the remainder thereof, 83.
  of surety by interference with his subrogation, 119.
  payment by indorser does not exonerate maker of note, 182.

EXPRESS COMPANY. *See* CARRIER.

EXTENT. *See* EXECUTION.

EXTINGUISHMENT. *See* PAYMENT.
  of mortgage by release from mortgagee, 12.
  of old mortgage by its discharge and taking of new, 20.
  of incumbrance by assignment to purchaser under junior lien, 22.
  operated by simple discharge against junior lien, 29.
  of incumbrance by purchase-money a ground of subrogation. 30.
  of incumbrance by assignment to one bound to pay it, 47, 50.
  what payment will amount to, and what to subrogation, 50.
  by assignment of mortgage to owner of equity, 53 *et seq.*
  See MERGER.
  not operated as to principal by surety's payment, 87, 135 *et seq.*
  of surety's indemnity by its assignment, 139, 158, 159.
  of lien barring subrogation to it, 176.
  of joint debt upon payment by one debtor, 180.
  of note upon payment by a stranger, 186.
  of note against maker, upon indorser's payment, 201.
  of debt upon voluntary payment by a stranger. 241.

F.

FATHER,
  not to be subrogated for support of child, 8.

FIRE. *See* INSURANCE.

FORECLOSURE,
  decree of, how far a bar to subrogation, 18.
  of prior mortgage, by one of several co-mortgagees, 27.
  rights and liabilities of purchaser under, 31, 32, 33.
  by conveyance of equity of redemption to mortgagee, 57.
  right of junior mortgagee in such cases, 57.
  right to order of sale to be claimed before, completed, 75.
  of mortgage paid by surety, subrogation upon, 128.

FORFEITURE,
  of insurance policy as to mortgagor, subrogation upon, 237.

H.

HEIR. *See* ADMINISTRATION OF ESTATES.
  subrogated on paying debts of succession, 3, 5.
    not to debts which he has paid as matter of bounty, 215.
  of surety succeeds to his subrogation, 86.
  of wife, subrogated against husband, 104.
  contribution among heirs to make up loss of one, 213.
  subrogated against co-heirs to burden which he has discharged, 215.
    and against distributees of personalty, 215.

HOMESTEAD. *See* SUCCESSIVE CLAIMS.
  subrogation against, upon payment of prior incumbrance, 21.
  right of, against purchaser who has paid prior incumbrance, 49 *et seq*.
  junior cannot compel prior creditor to resort to, 64.
    though prior creditor has purchased, 64.
  but prior creditor may resort to, against debtor, 64.
  when prior creditor must resort to, 64.
  protection of, in different States, 64.
  effect of waiver of right of, 64.

HUSBAND AND WIFE. *See* DOWER.
  subrogation against wife, upon payment of prior charge, 8.
    refused in Tennessee, 19, n. 1.
  rights of wife where deceased husband's real and personal property pledged for same debt, 51.
  incumbrance upon his real estate not to be so charged as to save dower, 51.
  where husband makes voluntary conveyance to his wife of an incumbered estate, 82.
  subrogation of wife who is surety for her husband, 104.
    against his assignee in insolvency, 104.
  securities marshalled for wife surety of husband, 104, 114, 130 *a*.
  where divorced husband and wife are joint debtors, 170.

I.

IGNORANCE. *See* MISTAKE.

ILLINOIS,
  original obligation preserved in, after surety's payment, 137.

INCUMBRANCE. *See* SUCCESSIVE CLAIMS.
  subrogation of one who pays debt to remove, from his property, 2.
  foreclosure of senior, gives no right to redeem from junior, 3.
  subrogation of one who has advanced money to pay, 8, 19.
  fraudulent discharge of, will not prevent subrogation, 8.
  subrogation of one who pays an, for his own protection, 9.
    of one compelled to pay taxes, 9, 14.
  subrogation of junior incumbrancer on paying prior, 12.

INCUMBRANCE — *continued.*
  effect of payment of, by one not the debtor, 13.
  may be treated as subsisting though formally discharged, 14.
  right of junior on payment of prior incumbrancer, 15, 16, 17.
  limitations of right of junior incumbrancer, 18.
  subrogation of one advancing money to pay, 19.
  where new, given for old, 20.
  rights and liabilities of purchaser of incumbered property, 22 *et seq.*, 28 *et seq.*
    See PURCHASER.
  rights of co-mortgagees against each other, 27.
  need not be assigned to one entitled to subrogation, 28.
    See ASSIGNMENT.
  when extinguished by taking discharge, 29.
  subrogation of one purchasing under, 31, 32, 33.
  holder of invalid, subrogated, 36 *a*.
  no subrogation to, if excluded by terms of sale, 37.
  transfer of, to purchaser in fraud of creditors, 40.
  when subrogation to, gives right to assignment of, 45.
  real debtor cannot be subrogated to, 46.
  assignment to one bound to pay, tantamount to discharge, 47.
  payment of, by dowress, entitles her to subrogation, 48.
  effect of payment of, upon dower, 49 *et seq.*
    See DOWER.
  not merged by assignment to debtor's assignee in insolvency, 49.
  when extinguished by assignment to owner of equity, 53 *et seq.*
    See MERGER.
  when prior incumbrancer postponed by his purchase of equity, 57 *et seq.*
  subrogation of junior incumbrancer whose security pays prior, 61.
    See MARSHALLING OF ASSETS.
  effect of release of, upon junior incumbrancer, 72 *et seq.*
  lien of judgment treated like other, 77.
  effect of partial release of, upon other part conveyed, 72 *et seq.*, 78.
    no effect, unless prior creditor had been notified, 81.
  surety upon payment subrogated to, 86 *et seq.*
  subrogation of co-purchasers of incumbered property, 172 *et seq.*
    See JOINT DEBTORS.
  no subrogation to, after extinguishment of, 176.
  upon estate of deceased, heirs or devisees subrogated to, 213.
  trustee subrogated to one, which he has paid, 214.

INDEMNITY. *See* CONTRIBUTION.
  obtained by subrogation, 11.
  of surety who is held to pay debt, 86 *et seq.*
  subrogation of surety's indemnifier, 106.
  of surety extinguished by his release from liability, 139.
    co-sureties entitled to share in, 141.
    See CO-SURETIES.

INDEMNITY — *continued.*
  of surety, creditor's right to reach, 157 *et seq.*
    See SUBSTITUTION.
  of solvent indorser, not available to holder of note, 188.
  insurer subrogated to, of insured, 221 *et seq.*
    See INSURANCE.
  of wrong-doer, person injured not substituted to, 244.

INDIANA,
  original obligation kept alive after surety's payment, 137.
  right to be shown in original suit, 137.

INDORSER. *See* NOTES AND BILLS.

INFANTS,
  subrogation against, upon payment of incumbrance, 8.
    for necessaries, 243.

INSOLVENCY. *See* BANKRUPTCY AND INSOLVENCY.

INSURANCE,
  subrogation under, equivalent to assignment, 6.
  subrogation of marine insurers, 221.
    abandonment equivalent to assignment, 221.
    may bring libel in own name, 221.
    subrogated by payment without abandonment, 221.
    insurers' payment no defence to wrong-doer, 221.
    subrogated to remedy of insured against wrong-doer, 222.
    relieved from liability by loss of their subrogation, 222.
    limitations of their subrogation, 223.
    will not include gift to insured, 223.
    merely a succession to remedies of insured, 223.
    barred by their laches, 223.
    not barred by insurer's estoppel, 223.
    not subrogated upon compromise of their liability, 224.
    effect of abandonment to insurers, 225.
    agents of insured become agents of insurers, 225.
    insurers of ship become entitled to its earnings, 225.
    and liable for its expenses, 225.
    subrogated to purchase by insured, 225.
    abandonment of ship will not avoid insurance on freight, 226.
    abandonment of ship and freight separately insured, 226.
    insurers of ship entitled to subsequent freight, 226.
    total loss allowed on each to insured, 226.
    rule in England, 227.
    insurers of freight subrogated against insured, 228.
  subrogation against carrier of insured goods, 229.
    ultimate responsibility upon carrier, 229.
    carrier cannot contest rightfulness of insurers' payment, 229.
    carrier may by contract have benefit of insurance, 229.
    not by implication merely, 229.
    subrogation to action for breach of contract to insure, 229.

IOWA,
- order of liability after successive sales of parts of incumbered estate, 76.
- original obligation preserved after surety's payment, 137.
- but his right must be enforced by action, 137.
- he may take assignment of original obligation, 137.

J.

JOINT DEBTORS,
- co-obligor subrogated on paying whole debt, 3, 5.
- subrogation of one, on payment, 41.
- subrogation among creditors of, 69–71.
- creditor may hold each for whole debt, 69.
- bail of one, not subrogated against another, 113.
- not always subrogated to original debt, 137, 169, 180.
- subrogated to property held against the debt, 169.
- subrogation of, against each other, 169.
  - sometimes refused, 169.
- creditor may hold until fully paid, 169.
- where one has assumed ultimate liability, 170.
  - the other subrogated against him, 170.
  - rule between divorced husband and wife, 170.
- rights of creditor not to be diminished, 170.
- and no subrogation if right waived, 170.
- in cases of partnership, 171.
  - no subrogation without settlement of partnership, 171.
  - subrogation of separate creditor against firm, 171.
  - retiring partner subrogated against those remaining, 171.
- substitution of creditor to security of retiring partner, 171 *a*.
  - to agreement taken by retiring partner, 171 *a*.
  - action on promise of new firm to pay debts of old, 171 *a*.
- where securities of different owners held for same debt, 172.
  - subrogation of one whose property pays, 172.
  - subrogation of co-mortgagors and co-purchasers, 172.
  - if property of one purchased by creditor, 172.
  - rights of co-tenant redeeming from tax sale, 172.
- where land of several owners subject to one mortgage, 173.
  - subrogation of the one paying the debt, 173.
- subrogation against grantee of a co-purchaser, 174.
  - refused in Georgia, 174
- subrogation of junior mortgagees against each other, 175.
- no subrogation to lien that has been extinguished, 176.
- where one of the owners of the securities is ultimately liable, 177.
  - his liability not extinguished by another's payment, 177.
  - application of rule to co-mortgagors and purchasers, 178.
  - where one purchaser pays share of others, 178.
- extent of subrogation among, 179.

JOINT DEBTORS — *continued.*
    limited to actual payment and proportionate share, 179.
    and to case of liability or compulsion, 179.
  whether original obligation extinguished upon payment by one, 180.
    generally preserved in equity against the others, 180.
  not so generally subrogated as sureties, 180.
  joint indorsers not subrogated, 181.

JUDGMENT. *See* EXECUTION; INCUMBRANCE.
  when payment of, by sheriff entitles him to subrogation to, 7.
  payment of, to client, subrogating attorney, 10 *a*.
  levied upon mortgaged lands, 21, 22.
  against vendor, subrogation of purchaser to, 36.
  subrogation of purchaser of goods, sold on, 38, 39.
  land sold under, subrogation of purchaser, 38, 39.
  lien of, treated like other incumbrance, 77.
  marshalling of assets to preserve lien of, 61.
  effect of release of levy on property primarily liable, 80.
  rights of purchaser of part of land subject to lien of, 83.
  subrogation of sheriff's sureties who have been compelled to pay, 90.
  between creditor and principal, surety may set up, 101.
  subrogation to, of bail of one defendant, 113.
  subrogation of sureties for, against prior sureties, 131 *et seq.*
  surety subrogated to benefit of, 135–138.
  joint debtors, how far subrogated to, 180.
  indorsers subrogated to benefit of, 201.
    See SUCCESSIVE SURETIES.

JUNIOR INCUMBRANCE. *See* SUCCESSIVE CLAIMS.

K.

KANSAS,
  original obligation preserved in, after surety's payment, 137.

KENTUCKY,
  order of liability after successive sales of parts of incumbered estate, 76.
  surety may preserve original obligation after his payment, 137.

L.

LACHES,
  is a waiver of the right of subrogation, 41, 110, 223.
  is waiver of right of marshalling assets, 66 *a*.
  of creditor, causing loss of security, may discharge surety, 121.
  creditor's claim to substitution must be seasonable, 156.
  of executor, barring his subrogation, 203.

LANDLORD AND TENANT. *See* LEASE.

LEASE,
- subrogation of lessee, on redeeming from prior mortgage, 14.
- or of mortgagee of lessee, 14.
- surety of lessee cannot compel distress by landlord, 115.
  - whether subrogated to right of distress, 115.
  - discharged by surrender of lease, 126.
  - but not as to rent already due, 126.
  - rule limited in bankruptcy, 126.
- right of lessor and lessee to each other's insurance, 238.

LEGACY,
- subrogation to lien of, upon purchased land, 21.
- rights of purchaser of land charged with, 77.
- surety paying, entitled to property held for, 100.
- lien on, of surety's executors who have paid debt of legatee, 100.
- legatee of partner subrogated like him, 171.
- charged with debt of legatee paid by executor, 202.
- subrogation in favor of legatees, 208.
- legatees subrogated to liens which they have paid, 210.
  - if they pay to preserve property to which they look, 210.
  - where specific legacies sold for testator's debts, 211.
- contribution among legatees, 213.
- charged with expense incurred for its protection, 214.
- creditors subrogated to rights of legatees, 217.
- subrogation for, lost by election of another, 218.

See ELECTION.

LEGAL PROCEEDINGS,
- subrogation of sureties in, against prior sureties, 131 *et seq.*

See SUCCESSIVE SURETIES.

LESSEE. *See* LEASE.

LETTER-CARRIER,
- subrogation of, 10.

LEVY OF EXECUTION. *See* EXECUTION.

LIBEL,
- insurers subrogated may bring, in own name, in admiralty, 221.

LIEN. *See* INCUMBRANCE; SUCCESSIVE CLAIMS.
- subrogation of one discharging, 8, 9, 19.
- of carrier, subsequent carrier subrogated to, 10.
- pledgee subrogated to carrier's, 12.
- creditor satisfying prior, subrogated to it, 8, 12.
- sheriff subrogated to carrier's, 12.
- of taxes, passing to one who has paid them, 14.
- of dower, party redeeming from, subrogated to, 15.
- subrogation of one who has discharged, 19, 20.
- prior, avoided by bankruptcy; junior, not advanced, 23.
- discharge of, of record, when set aside, 20.
- subrogation of one purchasing under, 31–88.
- rights of assignee of, 84.

MARSHALLING OF ASSETS — *continued.*
- doctrine of two funds, 61.
- junior creditor subrogated to prior creditor's lien, 61, 62.
  - if his fund taken to pay prior creditor, 61, 62.
- prior creditor required to exhaust fund exclusively his, 61.
- where prior creditor has lien upon two funds, 61.
- for holder of mechanic's lien, 61.
- doctrine not applied if unjust to senior creditor, 63.
  - nor unless first fund sufficient to satisfy him, 63.
  - or if first fund available only by litigation, 63.
  - or if recourse to another jurisdiction necessary, 63.
  - or where one has obtained fund unavailable to others, 63.
- junior creditor subrogated after prior creditor satisfied, 63.
- where prior creditor has taken junior liens, 63.
- when one of the funds subject to prior incumbrances, 64.
- though purchased by prior creditor, 64.
- junior cannot compel prior creditor to resort to homestead, 64.
- but prior creditor may do so against debtor, 64.
- when compelled to do so, 64.
- doctrine of two funds not applied for benefit of debtor, 64.
- junior cannot make senior creditor redeem from incumbrance, 64.
- not allowed to work injustice to third parties, 65.
- not made to the prejudice of purchasers, 65.
- or against property not owned by debtor, 65.
- where one of the funds primarily liable for both debts, 66.
- no subrogation for benefit of fund primarily liable, 66.
- among firm and separate creditors, 66.
- liability will not be cast upon other fund, 66.
- creditor's waiver of right, 66 *a*.
- right must be claimed before prior creditor acts, 66 *a*.
- mere neglect of prior creditor will not advance junior, 66 *a*.
- junior creditor must notify prior, 66 *a*.
- junior creditor not subrogated to lien created after his own, 67.
  - cannot complain till his security diminished, 67.
  - only to fund which ought to have paid the debt paid by his fund, 68.
- limited creditors not to take rights of general creditors, 68.
  - not subrogated to a secondary liability, 68.
- where each creditor has lien on same fund, 68 *a*.
- doctrine of two funds applied only if debtors are the same, 69.
  - does not prevent creditor from holding each debtor, 69.
  - not as between two sets of debtors, one a common one, 69.
  - prior creditor not to be thrown upon one debtor, 69.
  - but real debtor may be first held, 69.
- junior creditor not subrogated till prior satisfied, 70.
- application of this subrogation in Pennsylvania, 71.
- release by prior creditor of his primary fund, 72.
  - will postpone claim of prior creditor, 72.

MARSHALLING OF ASSETS — *continued.*
        waste or misapplication same as release, 72.
        not if made in good faith and without notice, 73.
        or if remaining fund sufficient for all demands, 73.
    purchaser's fund exonerated by release of primary fund, 78.
    rights of successive purchasers of parts of incumbered estate, 74 *et seq.*
        See PURCHASERS.
    of different securities, in favor of surety against creditor, 114.
        in favor of creditor against surety, 117, 129.
    among co-sureties, 141.
    among creditors of deceased persons, 204.
    in favor of legatees, 208.
    among heirs, devisees, or legatees, 213.

MARYLAND,
    no contribution in, between prior and later sureties, 134.
    surety on payment entitled to benefit of original obligation, 137.
    surety subrogated against co-sureties in, 137.

MASSACHUSETTS,
    rules as to widow's dower in incumbered estate, 52.
    no remedy allowed between prior and later sureties, 134.
    original obligation extinguished by surety's payment, 138.
    judgment not to be assigned to one debtor on his payment, 138.
    surety how far subrogated against his co-sureties, 140.
    right of creditor to security of surety who is also a creditor, 156.
    rule as to mortgagee's insurance in, 234.

MAXIM,
    sic utere tuo ut alienum non lædas, 4.

MECHANIC'S LIEN,
    marshalling of assets for protection of, 61.
    holder of, not subrogated to owner's insurance, 233.

MERGER,
    when caused by payment by one not the debtor, 18.
    when not caused by release of mortgage to mortgagor, 22.
    by assignment of mortgage to a purchaser of the premises, 26, 37.
    not caused by quitclaim of mortgage to purchaser in fraud of creditors, 40.
    created or not by assignment, as required by justice, 47, 49 *et seq.*
    when operated by sale of equity to mortgagee, 49.
        by assignment of mortgage to owner of equity, 53 *et seq.*
        according to justice and intent of parties, 53.
        prevented by intervening incumbrance, 53, 57, 60.
    tests by which determined, 54.
    not presumed, if contrary to interest, 54.
    or where interest held in different rights, 54.
    prevented only for innocent purpose, 54, 55.
    not prevented to prejudice of *bona fide* purchaser, 55.
        though discharge taken, 55.

MERGER — *continued.*
- operated if so intended at time of payment, 55.
  - by assignment to principal debtor, 56.
  - or to agent of principal debtor, 56.
  - or to purchaser charged with incumbrance, 56.
- owner of equity estopped from claiming, 56.
- not created by assignment to debtor as trustee, 56.
- by conveyance of equity to prior incumbrancer, 57.
- prevented by express agreement, 57, 58.
- determined by intent of parties, 57.
- retention of evidence of debt is evidence against merger, 58.
- where cancellation of prior incumbrance procured by fraud, 58.
- where purchase of equity is avoided, 58.
- when mortgage-debt paid by conveyance of equity to mortgagee, 59.
- in Massachusetts the intent to pay must appear, 59.
- elsewhere the contrary intent must appear, 59.
- *pro tanto*, operated by conveyance of part of equity, 59.
- effect of conveyance of equity to save foreclosure, 60.
- when prior incumbrance postponed by such conveyance, 60.
- not presumed where there is intervening charge, 60.
- unless intervening charge created by same owner, 60.
- operating discharge of security, 157.

MICHIGAN,
- original obligation preserved in equity after surety's payment, 137.

MINNESOTA,
- original obligation preserved in, after surety's payment, 137.

MINOR. *See* INFANCY.

MISSISSIPPI,
- subrogation of sheriff or his sureties limited in, 90, n. 5.
- effect of surety's payment on original indebtedness, 137.
- subrogation to judgment against principal, 137.
- right of creditor to security of surety who is also a creditor, 156.
- no contribution among specific legatees for common charge, 213.

MISSOURI,
- subrogation of later against prior surety, 134.
- subrogation *pro tanto* allowed in, after partial payment, 127.
- original obligation kept alive after surety's payment, 137.

MISTAKE,
- sheriff subrogated to judgment paid under, 7.
- subrogation of one who has paid incumbrance under, 19.
  - of one who has surrendered mortgage under, 20.
  - of one taking discharge in ignorance of other incumbrance, 29.
  - of legatee for money advanced under, 213.

MORTGAGE. *See* INCUMBRANCE; SUCCESSIVE CLAIMS.
- prior not substituted against subsequent mortgagee, 3.
- to principal, extinguished by agent's payment of debt, 5.
- holder of invalid, subrogated to charge which it has paid, 8.

N.

NEBRASKA,
  original obligation preserved after surety's payment, 137.
  surety may have judgment assigned to himself, 137.
NECESSARIES. *See* INFANT.
NEGLECT,
  of sheriff to levy execution, when ground of subrogation, 7.
  of purchaser to record deed no bar to subrogation, 9.
  prejudicing others is a bar to subrogation, 43.
  of prior creditor will not advance junior, 66 *a*.
  of surety, how far a waiver of his subrogation, 110.
  of creditor about security, how far discharges surety, 120 *et seq.*
  of bank, indorser subrogated to action for, 181.
NEVADA,
  original obligation extinguished by surety's payment, 138.
NEW HAMPSHIRE,
  original obligation not extinguished by surety's payment, 137.
  surety subrogated to pending attachment against principal, 137.
NEW JERSEY,
  subrogation of lessee redeeming from prior mortgage, 14.
  surety subrogated to original obligation in, 137.
  ward not substituted to mortgage given by guardian to surety, 166.
  rule as to mortgagee's insurance in, 234.
NEW YORK,
  original obligation not extinguished by surety's payment, 137.
  right of creditor to security of surety who is also a creditor, 156.
  subrogation of an accommodation acceptor, 199.
  real estate of deceased first applied to pay mortgage, 211.
NORTH CAROLINA,
  surety on payment may demand assignment to a trustee, 137.
  without such assignment, original obligation extinguished, 137.
  right to be enforced in separate action, 137.
    does not extend to mere joint debtor, 137.
NOTES AND BILLS,
  subrogation upon payment of check, 4.
  subrogation of one lending notes as surety, 8.
  due to principal, extinguished on payment by agent, 5.
  guarantor of, subrogated on payment to rights of holder, 87.
  indorser of, not subrogated to lien paid from proceeds of, 96.
  given by personal representative, rights of surety upon, 100.
  surety who has paid, cannot reissue, against principal, 105.
  surety of second subrogated against first indorser, 108.
  surety on new, not subrogated to security for old, 113.
  guarantor of indorser, how far subrogated, 113.
  indorser of, entitled to marshal securities given for, 114.

NOTES AND BILLS — *continued.*

duty of bank to apply deposits of principal upon, 124.
indorser not subrogated upon partial payment, 127.
surety upon, may take up and sue, 137.
payment by indorser stops suit against maker in Georgia, 137.
extinguished in Nevada by surety's payment, 138.
rule in California, 137.
parties to, not entitled to each other's indemnity, 150.
promise by second indorser to apply indemnity to pay, 150.
successive accommodation parties, not co-sureties, 150.
where first indorser kept quiet by second, 150.
security held by one under contingent liability upon, 157.
holder cannot reach indemnity of indorser whose liability not fixed, 157.
  such indemnity unavailable until indorser damnified, 160.
  unless it be security for payment of note, 160.
subrogation of indorser upon his payment, 181, 182.
partial payment by indorser, no defence to prior parties, 181, 182.
indorser remains surety after joining in bond with maker, 181.
subrogated against bank for its negligence, 181.
subrogation of joint indorsers refused, 181.
makers of, not entitled to benefit of payment by indorser, 182.
indorser subrogated to proof in bankruptcy, 182.
indorser subrogated as surety, 182 *a*.
  also accommodation maker, 182 *a*.
transferee of *bona fide* holder substituted to his rights, 183.
  though himself chargeable with equities, 183.
  indorser not subrogated against his own fault, 183.
subrogation of acceptor *supra protest*, 184.
  his rights and liabilities same as indorser's, 184.
transferees of, entitled to securities held for payment of, 185.
indorsement of mortgage note passes mortgage, 185.
  holder of security cannot discharge it against them, 185.
  though original holder could not have enforced it, 185.
  unless they take note overdue or with notice, 185.
  not always subrogated to vendor's lien, 185.
rights of a stranger upon payment of, 186.
  no subrogation for him, 186.
  when his payment may be revoked, 186.
  ratification of stranger's payment, 186.
  one who has agreed to be holden not regarded as stranger, 186.
  stranger will be deemed purchaser if so intended, 186.
holder of, entitled to security given by one party to another, 187.
  even though discharged by nominal mortgagee, 187.
  must be security given for payment of, 187.
  available to holder upon insolvency of parties, 187.
holder can claim indemnity of parties only upon insolvency, 188.
  accommodation parties not co-sureties, 188.

NOTES AND BILLS — *continued.*
    indorser's indemnity discharged by his release, 188.
  where bill made a lien upon a consignment, 189.
    property passes to indorsee, 189.
    on fraudulent bill of lading, 189 *a.*
  holders may resort to securities held by acceptor against, 190.
  where security insufficient, 190.
  all prior parties subrogated to such securities, 191.
  indorser discharged by release of security, 191.
  property in securities given by drawer to acceptor, 192.
    remains in drawer, subject to trust for payment of bills, 192.
  where security held by one under no liability, 193.
    holder cannot claim it, unless appropriated to bill, 193.
    what is sufficient appropriation, 193.
  extent of holder's right to acceptor's securities, 194, 198.
    yields to prior creditors of drawer and acceptor, 194.
    subject to general lien of bankers, 194.
  holder's right no greater than that of drawer, 195.
    cannot appropriate security if drawer could not, 195.
    cannot prevail against *bona fide* purchaser, 195.
    letter of advice not sufficient appropriation, 195.
    holder's right perishes with that of the giver of the security, 196.
    though bill taken on credit of the security, 197.
    unless bill operates equitable assignment, 197.
  holder can claim only rights of acceptor, 198.
    can claim acceptor's indemnity only on his insolvency, 198.
  right of acceptor to security held by prior parties, 199.
    not entitled to it unless by agreement, 199.
    though an accommodation acceptor, 199.
    but may have holder's security in New York, 199.
  acceptor's security is for all acceptances alike, 200.
    those who realize fund indemnified for expenses, 200.
    and may compel others to realize their securities, 200.
  holder of check how far subrogated, 200 *a.*
  when check drawn against whole of specific fund, 200 *a.*
  whether, extinguished upon payment by indorsers, &c., 201.
    if separate judgments against maker and indorser, 201.
    indorser may take assignment against maker, 201.
    or be subrogated without assignment, 201.
  limitations of the subrogation, 201.
  drawn in favor of laborers, no subrogation to their lien, 246.
  when one paying, regarded as equitable assignee, 246.

NOTICE,
  to junior, of waiver of rights of prior, incumbrancer, 17.
  no subrogation against purchaser without, 17.
  purchaser with, subrogated to rights of creditor without, 31.
  not essential to right of subrogation, 42.
  how far necessary to marshalling of assets, 66 *a.*

PAYMENT — *continued.*
- of an incumbrance, when a ground of subrogation, 8.
- of the debt of another, when subrogation follows, 9.
- by bank depositor, ground of subrogation, 10 *a*.
- by agent, when will subrogate him, 10 *a*.
- by attorney, ground of subrogation, 10 *a*.
- whether, operates extinguishment of debt or subrogation, 11.
- of prior incumbrance, will subrogate junior creditor, 12, 15.
- to attorney, subrogation upon, 15.
- of carrier's charges, will subrogate sheriff to his lien, 12.
- of money due upon mortgage, by one not the debtor, 13.
- of mortgage by one entitled to redeem, 13.
  - by one whose title it might have defeated, 14.
- must be made in full before subrogation, 14, 19, 25, 70, 83.
- by junior creditor, will not relieve debtor, 15.
- on prior incumbrance, goes to benefit of junior creditor, 17.
- right of junior to insist on paying prior creditor, 18.
- of incumbrancer with money advanced by another, 19.
- subrogation against one requesting, 19, 20.
- of old mortgage by new, 20.
- by purchaser under a junior lien, 21, 22.
- of mortgage by mortgagor, when no extinguishment, 22, 24 *et seq.*
  - when mortgage assumed by another, 24.
  - by one who has purchased subject to it, 26.
  - by a purchaser of the property, 28 *et seq.*
    See PURCHASER.
- made for the protection of one's interest will subrogate him, 33, 35.
- by purchaser of property, of debts chargeable upon it, 35.
- by holder of invalid title, 36 *a*.
- of incumbrance made by purchaser in fraud of creditors, 40.
- of debt by purchaser in his own wrong, 44.
- by real debtor no ground of subrogation, 46.
- by one who has assumed incumbrance, 47.
- of prior incumbrance by dowress will subrogate her, 48.
  - by another, effect of, upon dower, 49 *et seq.*
  - by one bound to pay debt, extinguishes it, 50, 52.
  - by owner of equity, when an extinguishment, 53 *et seq.*
    See MERGER.
  - by conveyance of equity of redemption, 58, 59.
- of prior creditor out of fund pledged to junior, 61 *et seq.*
  See MARSHALLING OF ASSETS.
- by surety, entitles him to subrogation, 86 *et seq.*
  - does not extinguish securities as to debtor, 87.
- in full, necessary to surety's subrogation, 89, 118, 127.
- surety subrogated before, upon principal's insolvency, 97.
- operated for surety by principal's set-off, 101.
- by surety, creditor cannot discharge security after, 108.
  - need not have been coerced on execution, 110.

PAYMENT — *continued.*
 of indebtedness to principal necessary to surety's subrogation, 112.
 of debt by principal extinguishes security, 116.
 of independent claim to debtor will not discharge surety, 123.
 by principal, when no discharge of surety, 123.
 by principal, made after, by surety, 125.
 need not come wholly from surety, 128.
 by surety, how far extinguishes original obligation, 135–138.
 by indorser of note, effect on suit pending against maker, 137, 182.
 when, entitles third person to surety's indemnity, 139.
 subrogation of surety against his co-sureties, upon, 140 *et seq.*
 See CO-SURETIES.
 by a co-surety, taken at money value, 151.
 upon, subrogation of joint debtor against the others, 169 *et seq.*
 See JOINT DEBTORS.
 by one debtor, how far an extinguishment of debt, 180.
 by indorser of note, subrogates him to rights of payee, 181.
  maker not entitled to benefit of, 182.
 by prior parties, subsequent parties have benefit of, 182.
 of note by stranger, 186.
 of bill, by property appropriated therefor, 189 *et seq.*
 of debts of deceased, personal representative subrogated upon, 202.
 by legatee, a ground of subrogation, 208, 210.
 of loss by insurers entitles them to subrogation, 221 *et seq.*
 of debt by a stranger extinguishes it, 1, 240.
 in full, essential to conventional subrogation, 248.
 action for, cannot coexist with subrogation, 249.

PENNSYLVANIA,
 purchaser subrogated to debt assumed by him, 35.
 judgment not extinguished by surety's payment, 137.

PLEDGE. *See* LIEN; SECURITY.

POLICY. *See* INSURANCE.

POSSESSION,
 of subsequent purchaser, not notice to prior incumbrancer, 81.

POST-OFFICE,
 subrogation of letter-carrier, 10.

PRACTICE,
 subrogation to be carried out with equitable discretion, 4.
  not to be enforced against legal right, 4.
  of sheriff upon paying a judgment, 7.
  of attorney to rights of client, 10 *a*.
  burden of proof on one claiming subrogation, 11.
  how far barred by decree of foreclosure, 18.
 two co-mortgagees may redeem from third, who holds prior mortgage, 27.
 remedies of purchaser under decree of foreclosure, 30, 31.

PRACTICE — *continued.*
creditor's election of remedies, 25, 41.
See WAIVER.
when right of subrogation gives right to assignment, 45.
remedy of purchaser of part of land subject to lien, 83.
surety subrogated before payment if debtor insolvent, 97.
  allowed benefit of principal's set-off or defence, 101.
  allowed writ of error on judgment against principal, 101.
  must elect between subrogation and remedy at law, 110.
  may in equity compel payment of debt by principal, 130.
  equitable rights of, 130 *a*.
rights of sureties on successive appeals, 131.
See SUCCESSIVE SURETIES.
whether original debt extinguished by surety's payment, 135–138.
equity enforces rights to co-surety's security, 140 *et seq.*
  whether extinguished by one joint debtor's payment, 180.
substitution of creditor to security held by surety, 154 *et seq.*
subrogation of accommodation acceptor, 199.
creditors of devisees, how subrogated, 212.
insurers may bring libel in own names, 221.
subrogation of insurers against fire in name of insured, 229, 230.
  mode of enforcing their remedy, 231, 232.
  action upon policy procured by mortgagor for mortgagee, 236.

PREFERENCE. *See* PRIORITY.

PRIMARY FUND. *See* MARSHALLING OF ASSETS.

PRINCIPAL AND AGENT. *See* AGENCY.

PRINCIPAL AND SURETY,
subrogation of surety by civil law, 2, 3, 5.
surety not subrogated if his claim barred at law, 4.
surety of tax-collector subrogated, 7.
subrogation of one who has lent his notes, 8.
  of agent bound as guarantor or surety, 10 *a*.
subrogation not confined to cases of suretyship, 11.
surety postponed to one whose money has paid prior lien, 19, 36.
action against primary for benefit of subsidiary debtor, 23.
mortgagor regarded as surety of one who has assumed mortgage, 24, 25.
principal becoming surety, 25.
surety entitled to assignment, to carry out his subrogation, 45.
security merged by assignment to principal or his agent, 56.
apparent principal when really surety, 182 *a*.
surety's right of subrogation against his principal, 86.
  will pass to his assignees or creditors, 86.
  and to his heirs and grantees, 86.
  not to be defeated by creditor, 86.
surety discharged if creditor interferes with his subrogation, 86.
takes no greater rights than creditor had, 86.

PRINCIPAL AND SURETY — *continued.*
- effect of surety's agreement to exonerate co-sureties, 103.
- subrogation of one who pledges his property for another's debt, 104.
  - of wife who has become surety for her husband, 104.
  - her rights against his assignee in insolvency, 104.
- extent to which surety's subrogation carried, 105, 111.
  - only so far as needed for his indemnity, 105.
  - not to reimburse him for gifts, 105.
- subrogation of surety of surety, 106.
  - how far carried, 106.
  - only to rights of immediate principal, 106.
  - not against principal who has paid his own surety, 106.
- indemnifier of surety subrogated, 106.
- how far creditors of surety may be subrogated, 107.
- when surety is apparent principal, 107.
- creditor not to discharge security after surety's payment, 108.
  - surety preferred to other claims of creditor, 108.
- subrogation of surety's indemnifier, 106.
- instances of subrogation of sureties, 109.
- waiver of surety's right of subrogation, 110.
  - surety's right of election, 110.
  - lost by lapse of time, 110.
  - not by mere delay and taking of other security, 110.
  - unless rights of others have accrued, 110.
  - how far barred by laches or negligence, 110.
  - barred by Statute of Limitations, 110.
  - when statute begins to run, 110.
  - election of surety between subrogation and law, 110.
  - not lost by contesting validity of security, 110.
- surety's subrogation subject to creditor's rights, 111.
  - rights of creditor accruing in ignorance of suretyship, 111.
- where purchaser's right accrues before suretyship, 111.
- surety's right superior to all subsequent claims, 111.
- subrogation refused to surety indebted to his principal, 112.
  - where surety has assumed payment of the debt, 112.
  - where surety has become principal on new obligation, 112.
- surety's right confined to contract for which he is surety, 113.
- guarantor of indorser subrogated only to rights of indorser, 113.
- bail of one defendant not subrogated against another debtor, 113.
- surety on one note not subrogated under another, 113.
- surety for one partner not subrogated against others, 113.
  - of shipmaster not subrogated against owners, 113.
  - of one executor not subrogated against the other, 113.
- surety's right to marshal securities, 114.
- same right between husband and wife, 114.
- surety cannot drive creditor first to security, 115.
  - must pay debt before his right accrues, 89, 115.
  - whether subrogated to right of distress, 115.

PRINCIPAL AND SURETY — *continued.*
- subrogation prevented by applying securities upon debt, 116.
  - or by payment from principal debtor, 116.
- creditor may apply security for his own protection, 117, 129.
  - where different securities held for distinct debts, 117, 129.
  - same security held for successive debts, 117, 129.
  - security given both to creditor and to surety, 117.
  - rights of surety on appeal bond, 117.
  - surety may compel proper application of security, 117.
  - creditor cannot apply it to other demands, 129.
- surety for part of debt not subrogated until whole paid, 118.
- unless there are different creditors, 118.
- creditor's giving up security discharges surety, 119.
  - not fair exchange of security, 119.
  - rule restricted in England, 119.
- creditor regarded as trustee of security for surety, 120.
  - must account for his neglect or omission, 120.
  - waiver of security by proof in bankruptcy, 120.
  - effect of compromise with principal, 120.
- surety discharged by creditor's laches, as to security, 121.
- creditor need only preserve security, 121.
- effect of creditor's discharge of levy or attachment, 122.
  - mere delay or failure to prosecute no discharge of surety, 122.
- creditor must retain means of principal in his hands, 123.
  - not unless surety would be subrogated to it, 123.
  - where corporation might have lien upon its stock, 123.
  - creditor is not bound to set off independent claims, 123.
  - or to violate agreement upon which security taken, 123.
  - when principal's payment no discharge of surety, 123.
  - effect of principal's insolvency, 123.
- discharge of surety by bank's not applying principal's deposits, 124.
- principal cannot require application of surety's deposits, 124.
- where surety pays in ignorance of creditor's discharge of security, 125.
- where principal pays after surety's payment, 125.
- surety discharged if subrogation impaired by creditor, 126.
  - though judgment rendered against surety, 126.
  - instances of such discharge of surety, 126.
  - by agreement not to hold principal, 126.
  - by giving principal funds in hands of creditor applicable to debt, 126.
  - by compromise of claims held as security, 126.
  - by accepting surrender of leasehold estate, 126.
  - by purchasing equity of redemption, when, 126.
- surety on bond not discharged by release of security caused by act provided against, 126 *a*.
  - if release caused by dishonest act of guardian, 126 *a*.
  - or by fraud of cashier, 126 *a*, n.

PRINCIPAL AND SURETY — *continued*.
  surety not subrogated until whole debt paid, 127.
    subrogation *pro tanto* allowed in Missouri, 127.
    or where subrogation would compel repayment by creditor, 127.
  principal cannot object creditor's non-satisfaction, 128.
  payment need not come wholly from surety, 128.
    need only be to satisfaction of creditor, 128.
    where security held for several debts, 129.
    partial payment of mortgage by surety repaid on foreclosure, 128.
  surety may compel principal to pay debt, 130.
    may compel application of principal's property, 130.
    may have decree for subrogation on future payment, 130.
    cannot sue in name of creditor, 130.
    entitled to what equitable relief, 130 *a*.
    assets marshalled for his benefit, 130 *a*.
    undisturbed pending writ of error, 130 *a*.
    subrogated to benefit of his principal's purchase, 130 *a*.
  subrogation of successive sureties against each other, 131 *et seq.*
    See SUCCESSIVE SURETIES.
  whether original debt extinguished by surety's payment, 135 *et seq.*
    rule in England, under decisions and statute, 135.
    generally preserved for surety in United States, 136.
    surety takes rights the creditor had before payment, 136.
    not subrogated to foreign judgment, 136.
    States in which original debt preserved for surety, 137.
    States in which old English rule followed, 138.
    subrogation sometimes limited to independent securities, 138.
    and original debt extinguished by surety's payment, 138.
    States in which this rule is adopted, 138.
  surety's indemnity discharged by his release, 139.
    when it will pass to a third person, 139.
  surety's subrogation against his co-sureties, 140 *et seq.*
    See CO-SURETIES.
  substitution of creditor to surety's security, 154 *et seq.*
    See SUBSTITUTION.
  relation of, between joint debtors, 169 *et seq.*
    See JOINT DEBTORS.
  bail in criminal cases not subrogated, 168.
  surety of one joint debtor subrogated against the other, 178.
  what parties to note or bill are sureties, 182 *a*.
  surety for pre-existing debt not subrogated against prior parties, 242.
  not subrogated if mistake of liability, 245.

PRIOR INCUMBRANCE. *See* SUCCESSIVE CLAIMS.

PRIORITY,
  of creditor, surety subrogated to, 88.

PRIVITY. *See* CONTRACT.

PURCHASER — *continued.*
    assignment in such case tantamount to discharge, 47, 52.
  subrogation of, against widow's dower, 49 *et seq.*
    See DOWER.
  when mortgage merged by assignment to, 53 *et seq.*
  merger not prevented to prejudice of, 55.
    See MERGER.
  sale of equity of redemption to prior incumbrancer, 57 *et seq.*
  not to be prejudiced by creditors' marshalling of assets, 65.
  of portion of incumbered estate, rights of, 74 *et seq.*
    when subrogated upon paying incumbrance, 74.
    when entitled to no subrogation, 74.
  order of liability of parcels sold successively, 75.
  effect of conveyance made with warranty, 75.
  right of, to cast burden on remaining estate, 75.
    and on estates of subsequent purchasers, 75.
    successive mortgages have same effect, 75.
    successive conveyances to same purchaser, 75.
    conveyances of undivided interests, 75.
    right must be seasonably claimed, 75.
    rule varied in Iowa, Kentucky, and Georgia, 76.
  no distinction between mortgage and other liens, 77.
  rights of successive grantees of judgment-debtor in Tennessee, 77.
  of parts of land charged with legacies, 77.
  discharged *pro tanto* by release of land primarily liable, 78.
  secondary fund released by release of primary fund, 78.
    but not as between real debtor and creditor, 78.
    or unless it ought in justice to be released, 79.
    when property of, not exonerated by such release, 79.
    where full value once applied, 79.
  not having paid price, must contribute for subsequent grantee, 79.
  where successive mortgages followed by absolute sales, 79.
  released by release of any remedy to which he would be subrogated, 80.
  by release of levy, 80.
  incumbrancer must have notice of rights of, 81.
    mere record of conveyance not such notice, 81.
  mortgagor may vary order of liability by stipulation, 82.
  assumption of mortgage by, binds land purchased, 82.
  cannot dispute mortgage which assumed, 82.
  subsequent, subrogated against such prior purchaser, 82.
  rights of voluntary grantee against debtor, 82.
  subject to mortgage, must contribute, 82.
  having assumed specified part of mortgage, 82.
  extent of right of subsequent purchaser, 83.
  mortgagee's rights not diminished, 82, 83.
  purchaser must seasonably enforce right, 83.
  exonerated by creditor's acquiring remaining parcels with notice, 83.

PURCHASER — *continued.*
  at tax sale has not rights of, with warranty, 83.
  instances of the application of these rules, 84.
  subrogated to rights of attaching creditor, 84.
  assuming mortgage, rights of mortgagee against, 85.
  postponed to prior surety of vendor, 88.
  from wife, subrogated against husband, 104.
  rights of, inferior to those of surety, 88, 98, 104, 106, 109.
    rights of vendor, becoming surety for, 99.
    unless accruing before the suretyship, 111.
  surety of, subrogated to rights of vendor, 96, 97.
  vendor's surety subrogated to rights of, 98.
  not subrogated against surety, 126.
  co-purchasers subrogated against each other, 172 *et seq.*
  where one pays shares of others, 178.
  of security when preferred to billholder, 195.
  creditors of deceased, subrogated to vendor's rights, 204.
  from a personal representative, subrogation of, 209.
    subrogated to charges which his money has paid, 209.
    limitations of this subrogation, 209.
  from heir or devisee, rights of, 216.
  insurers subrogated to purchase by insured, 225.
  right of, to vendor's insurance, 235, 238.
  vendor's lien against. *See* VENDOR'S LIEN.

Q.

QUITCLAIM,
  of mortgage operating as assignment, 40, 49.
  from mortgagor does not pass right to defend against mortgage, 37.

R.

RAILWAY SECURITIES,
  subrogation for money borrowed *ultra vires*, 19.
  subrogation of holders of bonds issued to pay prior charge, 19.
  holders of, how far subrogated to lien of government, 167 *a.*
  coupons, purchase or payment of, 243 *a.*
RATIFICATION,
  of payment of note by a stranger, 186.
RECOGNIZANCE,
  failure of officer to record, no defence to surety, 121.
  substitution to security of sureties in criminal, 168.
RECORD,
  no subrogation against interests taken on faith of, 17, 20, 153.
  of discharge of mortgage, when set aside, 20.
  subrogation on failure to make, of deed, 30, 31.
  mere failure to make, no bar to subrogation, 43.

RECORD — *continued.*
    unless it would prejudice subsequent interests, 43.
  right of purchaser of part of incumbered estate shown by, 75.
  of subsequent deeds, mortgagee not affected by, 81.
  unless special duty to examine, 81.
  discharge of surety by creditor's failure to make, 121.
    not by failure of public officer to make, 121.
  of mortgage to surety, notice of creditor's rights, 155.
  no subrogation to lien lost for lack of, 176.

REDEMPTION. *See* INCUMBRANCE; MORTGAGE; SUCCESSIVE CLAIMS.
  of incumbrance, subrogation upon, 13 *et seq.*
  limitations of right of junior creditor, 18.
  when incumbered lands sold under junior lien, 21, 22.
  of pledge by assignee in bankruptcy, 23.
  by co-mortgagees from each other, 27.
  from prior incumbrance, effect of, upon dower, 49 *et seq.*
  right of dowress to make, 49 *et seq.*
    See DOWER.
  by different owners of securities for same debt, 172 *et seq.*
  by co-tenant, rights upon, 172.
    See JOINT DEBTORS.

REIMBURSEMENT,
  of one who has paid off prior incumbrance, 12 *et seq.*
    See SUCCESSIVE CLAIMS.
  subrogation allowed only for purpose of obtaining, 21.
  of surety upon his payment of debt, 86 *et seq.*
    See PRINCIPAL AND SURETY.
  creditor substituted to his debtor's claim for, 167.
    but not to his debtor's remedy for a tort, 244.
    implied agreement for, avoided by subrogation, 249.

RELEASE,
  from prior to junior mortgagee extinguishes lien, 12.
  to one entitled to subrogation treated as assignment, 13, 14, 22, 24.
  of incumbrance fraudulently made treated as assignment, 19.
  of mortgage to purchaser in fraud of creditors, 40.
  of dower operating estoppel, 49.
  by prior creditor of fund primarily liable, 72.
  waste or misapplication regarded as, 72.
  will not prejudice creditor without notice of junior interest, 73.
  of primary fund discharges secondary fund *pro tanto*, 78.
    but not as between real debtor and creditor, 78.
    or unless it ought in justice to do so, 79.
  discharges purchaser entitled to subrogation, 80.
    if creditor has notice of purchaser's right, 81.
  of surety by interference with his subrogation, 119 *et seq.*
    by interference with co-sureties' subrogation, 151.
  given to surety for transfer of his indemnity, 158, 159.

SHERIFF — *continued.*
  full payment of judgment essential, 7.
  subrogated to rights of his deputy, 7.
  judgment debtor subrogated against, 7.
  subrogated to lien for carrier's charges, 12.
  subrogation of sureties of, 90.
  limited in Mississippi, 90, n.
  subrogation of debtor's sureties against, 91.

SHIP,
  subrogation of insurers of, 221 *et seq.*
  subrogation to maritime liens, 34, 243.

SHIPMASTER,
  bail of, not subrogated against owners, 113.

SOUTH CAROLINA,
  surety subrogated to original debt upon payment, 137.
  and son against father, 137.

STATE. *See* GOVERNMENT.

STATUTE OF LIMITATIONS. *See* LIMITATIONS.

STOCK. *See* CORPORATION.

STOPPAGE IN TRANSITU,
  officer subrogated to carrier's lien for charges, 12.

STRANGER,
  not subrogated upon voluntary payment of another's debt, 1.
  payment of obligation by, extinguishes it, 3.
  mortgage to principal extinguished by agent's payment, 5.
  subrogation when allowed, 8.
  cannot set up satisfied mortgage as basis of title, 12.
  not subrogated by paying part of debt at debtor's request, 19.
  subrogation where payment made on request, 19, 20.
  voluntary purchasers of debtor's interest not subrogated, 39.
  son subrogated against father in So. Car., 137.
  paying debt, may have security by agreement, 155.
  effect of payment of note by, 186.
  not entitled to subrogation, 240.
  voluntary payment of debt by, extinguishes it, 241.
    no ground of action or of subrogation, 241.
    so with surety for pre-existing debt against prior parties, 242.
    or one who loans money for payment of a debt, 243.
    unless he has an interest in its discharge, 243.
    or unless so agreed or understood, 243.
    or unless fraud would be operated, 243.
    or has kept the lien alive for himself, 243.
    subrogation against infant for necessaries, 243.
  purchase of coupons on secured bonds by stranger, 243 *a.*
  lending of money to pay interest on secured bonds, 243 *a.*
  creditor not substituted to debtor's remedy against wrong-doer, 244.

STRANGER — *continued.*
    who regarded as volunteers, 245, 246.
        not one who was under liability, 245.
        nor director or stockholder to corporation, 245.
        nor *cestuis que trustent* to trustee, 245.
        nor agent to principal, 245.
        nor widow or children to deceased, 245.
        nor one paying to protect his own interest, 245.
        one mistaking himself for surety, 245.
        instances of subrogation of one paying debt of another, 246.
            of groom paying for shoeing horse, 246.
            of clerk of steamboat paying wages of crew, 246.
            of drawee paying drafts in favor of laborers, 246.
            of county against its treasurer, 246.
            of general agent paying debt of subordinate, 246.
            of corporation paying debts of its predecessor, 246.
            of one paying debt under mistaken idea of liability, 246.
    subrogation of one paying debt at instance of debtor, 247.
        where this was intended by the parties, 247.
        intent inferred from circumstances, 247.
        not allowed against third parties, 247.
        mere payment of debt not enough, 247.
    subrogation of, by agreement, 248 *et seq.*
        will be enforced in equity, 248.
            See CONVENTIONAL SUBROGATION.

SUBROGATION,
    definition and nature of, 1.
    derived from civil law, 1.
    application of, at common law, 1.
    designed to secure justice, 1.
    is independent of contract, 1, 11.
    of one paying debt which another should have paid, 1, 24.
    not allowed for volunteers or intermeddlers, 1, 240 *et seq.*
        or where it would work injustice, 1.
    definition in civil law, 2.
    who entitled to, 3.
        insurers, 3.
        creditor paying lien of prior creditor, 3.
        purchaser extinguishing incumbrance on estate, 3.
        co-obligor or surety on payment of debt, 3.
        heir paying debts of succession, 3.
        creditor to debtor's remedies, 3, 154 *et seq.*
        one paying his own debt assumed by another, 3, 24.
    payment essential to, 3, 6, 14, 19, 25, 45, 70, 118, 127.
    not allowed if against rights of other creditors, 4.
        or against one's own wrong, 4, 44.
    when and for whose benefit allowed in Louisiana, 5.
    to be distinguished from assignment, 6.

SUBROGATION — *continued.*
  gives only rights already existing, 6.
  subrogation of sheriff compelled to pay a judgment, 7.
    of tax-collector, 7.
    of one who has advanced money to pay incumbrance, 8, 19.
    of one compelled to pay debt of another, 9.
    of a carrier, 10.
    of carrier's agent, 10.
    of letter-carrier, 10.
    of consignee or agent, 10 *a*.
  general doctrine of, 11.
  compels discharge of debt by party ultimately liable, 11.
  allowed only on sustaining burden of proof, 11.
  where there are successive claims on same property, 12 *et seq.*
    See SUCCESSIVE CLAIMS.
  of one who has paid off an incumbrance, 13 *et seq.*
  not allowed against interest taken on faith of record, 17.
  latent equity of, against purchaser, 17.
  allowed only for protection and reimbursement, 18, 21.
  of one advancing money to pay incumbrance, 19.
  of one taking new incumbrance for old, 20.
  allowed only if intended or necessary, 19.
  against corporation for money borrowed *ultra vires*, 19.
  against one at whose request money paid, 19, 20.
  of and against a purchaser under a junior lien, 21, 22.
  of an assignee in bankruptcy, 23.
  of mortgagor paying his own mortgage, 24, 25, 26.
  of and against purchaser of incumbered property, 24–28 *et seq.*
    upon estoppel of incumbrancer 29.
    See PURCHASER.
  of co-mortgagees against each other, 27.
  right of, will pass to grantee of one entitled to, 28.
  of purchaser under decree, 31.
  upon payment made to protect one's interest, 33.
  not allowed for claims which could not have been enforced, 35.
  of one whose title invalid, 36 *a*.
  of purchaser of property sold on execution, 38, 39.
  voluntary purchaser of debtor's interest not entitled to, 39.
  waiver of right of, 41, 42.
  right of, lost by negligence prejudicial to others, 43.
  party seeking, must not be in his own wrong, 44.
  when one entitled to, may require assignment, 45.
  the real debtor not entitled to, 46.
  dowress entitled to, on paying prior incumbrance, 48.
  of purchaser against widow's dower, 49 *et seq.*
    See DOWER.
  of purchaser, to mortgage assigned to him, 53 *et seq.*
    See MERGER.

SUBSTITUTION — *continued.*
  may be discharged in mean time, 160.
  surety while solvent may surrender indemnity, 161.
  to surety's indemnity allowed upon insolvency, 162.
    but surety must be debtor of the creditor, 162.
    and entitled to enforce indemnity, 162.
  surety's indemnity sometimes treated as security for debt, 163.
  not allowed to prejudice partial surety, 164.
    indemnity applied first to relieve surety, 164.
  allowed only to security created against debt, 165.
  instances of creditor's, 166.
    to mortgage given by principal to surety, 166.
    to mortgage given by maker to indorser of note, 166.
    of ward, to mortgage given by guardian to surety, 166.
  of creditor to his debtor's claim for reimbursement, 167.
  to mortgage given to government, 167 *a.*
  to security of sureties, in criminal recognizance, 168.
    judgment must first be obtained against sureties, 168.
  of firm creditors, to rights of retiring partner, 171 *a.*
  of creditors of deceased, to rights of executors, 206.
  to remedy of debtor for a tort, not allowed to creditor, 244.
SUCCESSION. *See* ADMINISTRATION OF ESTATES.
SUCCESSIVE CLAIMS,
  upon same property, subrogation of parties having, 12.
  of junior incumbrancer to prior incumbrance, 12.
  subrogation made according to just intent of parties, 13.
  effect of payment of mortgage by one entitled to redeem, 13.
    by one whose title it might have defeated, 14.
    by mortgagee of leasehold estate, 14.
    by tenant for life or years, 14.
    by junior incumbrancer, 15.
    made to attorney, 15.
  rights of junior incumbrancer in England, 16.
  extent of junior incumbrancer's right, 17.
  limitations of his right, 18.
  subrogation of one advancing money to pay incumbrance, 19.
    where advance made on new security, 19.
    refused against married woman in Tenn., 19.
    where payment made under mistake, 19.
    against one requesting payment, 19, 20.
  where new mortgage given in place of old, 20.
  discharge of mortgage set aside, when, 20.
  subrogation of holder under a judgment-lien, 21.
  where incumbered lands sold under junior lien, 21, 22.
  subrogation of debtor against purchaser under junior lien, 22.
  rights in mortgaged estate of successive attaching creditors, 22.
  subrogation of assignee in bankruptcy, 23.
    to pledges redeemed, 23.

SUCCESSIVE CLAIMS — *continued.*
    to securities waived, 23.
  rights and liabilities of purchaser of incumbered estate, 24 *et seq.*
    See PURCHASER.
  rights of co-mortgagees against each other, 27.
  subrogation allowed only for reimbursement, 35.
  prior creditor not subrogated to junior lien, 35.
  voluntary purchaser of debtor's interest not subrogated, 39.
  waiver of right of subrogation, 41, 42.
  right lost by negligence prejudicing subsequent interests, 43.
  when right of subrogation gives right to assignment, 45.
  no subrogation against incumbrance assumed, 46.
  or charge which party bound to pay, 46.
  incumbrance discharged by assignment to one bound to pay, 47.
  dowress subrogated on paying prior incumbrance, 48.
  effect on dower of payment of prior incumbrance, 49 *et seq.*
    See DOWER.
  extinguishment of incumbrance by assignment to owner of equity, 53.
    See MERGER.
  effect of conveyance of equity in payment of prior lien, 58, 59, 60.
  when prior lien postponed by such conveyance, 60.
  subrogation of junior creditor whose fund pays prior creditor, 61.
    See MARSHALLING OF ASSETS.
  junior creditor not subrogated till prior creditor paid, 70.
  subrogation of purchaser of part of incumbered estate, 74.
    See PURCHASER.
SUCCESSIVE SURETIES,
  subrogation of, against each other, 131.
    have not equal rights, 131.
    not allowed to surety on suit against prior surety, 131.
    but prior surety subrogated against him, 131.
    but liable after subsequent sureties exhausted, 131.
  later cannot claim indemnity given to prior surety, 131.
  rights of surety for payment of a judgment, 132.
    surety for debt may hold surety for judgment, 132.
  where later surety is surety for original sureties, 133.
    surety subrogated against all his principals, 133.
  when prior sureties are principals of new surety, 133.
  exceptions to usual rule of successive sureties, 134.
    in Louisiana, later subrogated against prior, 134.
    same rule in Missouri, 134.
    in Virginia, subrogated against prior purchaser, 134.
    but not against prior surety, 134.
    in Massachusetts, no remedy between them, 134.
    same rule in Maine, 134.
    in Maryland, no contribution between them, 134.
  subsequent, not co-sureties with prior, 150.
    not entitled to indemnity of prior, 150.

SUCCESSIVE SURETIES — *continued.*
who are co-sureties, and who successive sureties, 150.
rights of co-sureties becoming subsequent sureties, 150.

SUPERSEDEAS BOND,
prior surety for debt subrogated against surety on, 132.

SURETY. *See* PRINCIPAL AND SURETY.

T.

TAXES. *See* COLLECTOR; GOVERNMENT; INCUMBRANCE.
subrogation of officer who has paid, 4, 7.
of surety of officer, 7.
purchaser subrogated to lien of, on imported goods, 35.
one bound to pay, not to be subrogated for, 46.
rights of co-tenant redeeming from sale for, 172.

TENANT FOR LIFE,
may redeem from mortgage and be subrogated, 14.
subrogated against remainder-man, 207 *a*.

TENANT FOR YEARS. *See* LEASE.

TENANT IN COMMON. *See* JOINT DEBTORS; PURCHASER.

TENNESSEE,
subrogation refused against wife in, 19, n. 1.
assets marshalled in, between firm creditors, 66.
rights of successive grantees of judgment-debtor, 77.
surety upon payment entitled to original obligation, 137.
this right not extended to mere joint debtors, 137.

TEXAS,
surety upon payment entitled to original obligation, 137.
subrogated to judgment and pending attachment, 137.
right must be shown in original suit, 137.

TITLE. *See* PURCHASER.
stranger cannot set up satisfied mortgage as basis of, 12.
but junior claimant who paid it to protect his title may, 12.
purchaser must accept, to have right to redeem, 16.
to incumbered premises successively attached by different creditors, 22.
purchaser under adverse, subrogation of, 31.
rights of grantee of one holding bond for, 34.
invalidity of, no bar to subrogation, 36 *a*.
acquired on faith of record, no subrogation against, 153.
and under Statute of Limitations, 176.

TORT,
subrogation to remedy for, 10.
of purchaser to vendor's remedy for, 37.
indorsee of note, how far subrogated to action for, 183, 201.
insurers subrogated to remedy of insured for, 222 *et seq.*
creditor not substituted to debtor's remedy for, 244.

VIRGINIA,
  later surety subrogated against prior purchaser, 134.
  but not against prior surety, 134.
  original surety allowed no contribution from later, 134.
  original obligation preserved after surety's payment, 137.

VOLUNTARY CONVEYANCE. *See* PURCHASER.

VOLUNTEER,
  will not be subrogated, 1.
  See STRANGER.

W.

WAIVER. *See* ESTOPPEL.
  assignee subrogated by, of creditor, 23.
  of security in bankruptcy, effect of, 23.
  of lien of prior will not necessarily affect junior incumbrancer, 17.
    to whom available, 28.
  of subrogation by taking discharge of incumbrance, 29.
  of right of subrogation in general, 41, 42.
  by election of remedies, 41.
  by conveying property without setting up claim, 41.
  by agreement for different appropriation of property, 41.
  by lapse of time, 41.
  taking new security may not be, 42.
  usury in new security is not, 42.
  agreement consistent with subrogation is not, 42.
  of right of homestead, effect of, 64.
  of right of marshalling assets, 66 *a*.
  of purchaser's right to have his land sold last for debt of his grantor, 83.
  by surety, of objection to principal's assignment of his debt, 102.
  of surety's subrogation, not made by exonerating his co-sureties, 103.
    nor by agreement to reconvey security to principal, 104.
  of surety's right of subrogation, 110.
  what is and what is not, 110.
  of subrogation among co-sureties, 147.
  of devise upon condition, subrogation upon, 220.
  of remedy at law, by conventional subrogation, 249.

WARD. *See* GUARDIAN.

WARRANTY,
  grantee with, of mortgaged property, rights of, 24, 28.
  one cannot be subrogated against his, 46.
  liability of parts of incumbered premises conveyed with, 75.
  rights of grantees without, 77.
  breach of, to principal, how far a defence to surety, 101.

WASTE,
  co-executors not responsible for each other's, 202.

WIDOW. *See* Administration of Estates; Dower.

WISCONSIN,
  judgment in, not extinguished by surety's payment, 137.

WRIT OF ERROR,
  surety may maintain, on judgment against principal, 101.
  surety to be undisturbed pending principal's, 130 *a*.

WRONG-DOER,
  carrier subrogated against, 10.
  denial of subrogation to, 44.
  insurers subrogated to remedies of insured against, 222.
  creditor not substituted to debtor's remedy against, 244.